Docket for 02-1472

No. 02-1472
Title: Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation, Petitioners

v.

Tommy G. Thompson, Secretary of Health and Human Services, et al.

Docketed: April 7, 2003
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (01-7106)
Decision Date: November 26, 2002
Rehearing Denied: January 22, 2003
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Apr 3 2003	Petition for writ of certiorari filed. (Response due June 6, 2003)
Apr 30 2003	Order extending time to file response to petition to and including June 6, 2003.
Jun 6 2003	Brief of respondents Tommy G. Thompson, Secretary of Health and Human Services, et al. in opposition filed.
Jun 16 2003	Reply of petitioners Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation filed.
Jun 18 2003	DISTRIBUTED for Conference of September 29, 2003.
Jul 16 2003	Supplemental brief of petitioners Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation filed. (Distributed)
Aug 26 2003	Letter from Solicitor General concerning related case received and distributed.
Sep 17 2003	Letter from counsel for petitioners received and distributed.
Sep 25 2003	Supplemental brief of respondents Tommy G. Thompson, Secretary of Health and Human Services, et al. filed. (Distributed)
Oct 6 2003	DISTRIBUTED for Conference of October 10, 2003.
Jan 5 2004	DISTRIBUTED for Conference of January 9, 2004.
Feb 25 2004	DISTRIBUTED for Conference of March 19, 2004.
Mar 22 2004	Petition GRANTED The case is consolidated with No. 03-853 and a total of one hour is allotted for oral argument.
Apr 27 2004	Extension of time within which to file the joint appendix and petitioners', Cherokee Nation, et al., brief on the merits to and including June 4, 2004.
Jun 17 2004	Brief amici curiae of Tunica-Biloxi Tribe of Louisiana, et al. filed. VIDED.
Jun 18 2004	Brief amici curiae of Chamber of Commerce of the United States, et al. filed. VIDED.
Jun 18 2004	Joint appendix filed. VIDED. (Jt. appendix in two volumes)
Jun 18 2004	Brief amicus curiae of Seldovia Village Tribe filed. VIDED.
Jun 18 2004	Brief of petitioners Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation filed. VIDED.
Jun 18 2004	Brief amicus curiae of National Congress of American Indians filed. VIDED.
Jun 21 2004	Extension of time within which to file respondents' (Thompson, et al.) brief on the merits to and including August 13, 2004.
Aug 11 2004	Further extension of time within which to file respondents' (Thompson, et al.) brief on the merits to and including September 3, 2004.
Aug 19 2004	CIRCULATED.

Sep 1 2004	SET FOR ARGUMENT Tuesday, November 9, 2004.
Sep 3 2004	Brief of respondents Federal Parties filed. VIDED. (Distributed).
Sep 28 2004	Record received from U.S.C.A. - 10th Circuit. (1 box)
Oct 8 2004	Reply of petitioners Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation filed. VIDED. (Distributed)
Oct 12 2004	Record received from U.S.D.C. Eastern Dist. of Oklahoma. (2 boxes)
Oct 27 2004	Letter dated October 27, 2004 received from counsel for the petitioners.VIDED. (Distributed).
Nov 9 2004	Argued. For petitioners: Lloyd B. Miller, Washington, D.C. For respondents: Sri Srinivasan, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED

0 21472 APR 3 2003

No. 02-__

IN THE

Supreme Court of the United States

CHEROKEE NATION and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

CARTER G. PHILLIPS
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

RIYAZ KANJI
KANJI & KATZEN
201 South Main St.
Ann Arbor, MI 48104
(734) 769-5400

* Counsel of Record

LLOYD BENTON MILLER *
HARRY R. SACHSE
ARTHUR LAZARUS, JR., PC
MELANIE B. OSBORNE
NACOLE D. HESLEP
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20007
(202) 682-0240

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

122 pp

QUESTIONS PRESENTED

1. Whether the federal government can repudiate, without liability, express contractual commitments for which it has received valuable consideration, either by spending down discretionary agency appropriations otherwise available to pay its contracts, or simply by changing the law and the contracts retroactively.

2. Whether government contract payment rights that are contingent on "the availability of appropriations" vest when an agency receives a lump-sum appropriation that is legally available to pay the contracts—as is the law of the Federal Circuit under *Blackhawk Heating*—or is the government's liability calculated only at the end of the year after the agency has spent its appropriations on other activities, as the Tenth Circuit ruled below.

PARTIES TO THE PROCEEDINGS

Petitioners, plaintiffs-appellants below, are the Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada. They brought this action on their own behalf.

Respondents, defendants-appellees below, are the United States, Secretary of Health and Human Services Tommy Thompson, and Interim Director of the U.S. Indian Health Service Charles Grim. (Director Grim has been substituted pursuant to S. Ct. Rule 35.) Individual respondents are sued in their official capacities.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	11
I. THE QUESTIONS PRESENTED CONCERNING GOVERNMENT CONTRACTS ARE EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THIS COURT	11
II. THE TENTH CIRCUIT DECISION CREATES A DESTABILIZING INTER-CIRCUIT CONFLICT REGARDING AN AGENCY'S DUTY TO MEET CONTRACT OBLIGATIONS OUT OF AVAILABLE APPROPRIATIONS, AND THE FORCE OF MERE APPROPRIATIONS COMMITTEE RECOMMENDATIONS IN GOVERNMENT CONTRACTING MATTERS	15
III. THE TENTH CIRCUIT DECISION REPRESENTS AN UNPRECEDENTED EXPANSION OF CONGRESS' POWER TO CLARIFY PRIOR AMBIGUOUS LAW INTO AN UNREVIEWABLE POWER UNILATERALLY TO ABROGATE CONTRACT RIGHTS	19

TABLE OF CONTENTS—Continued

	Page
CONCLUSION	24
APPENDIX A	
Opinion of the Court of Appeals for the Tenth Circuit, filed November 26, 2002	1a
APPENDIX B	
Opinion of the District Court for the Eastern District of Oklahoma, filed June 25, 2001	24a
APPENDIX C	
Order of the Court of Appeals for the Tenth Circuit denying petition for rehearing *en banc*, filed January 22, 2003	51a
APPENDIX D	
Statutory provisions involved	53a
APPENDIX E	
Statutes conditioning agency contracting authority on the availability of appropriations	78a

TABLE OF AUTHORITIES

CASES

	Page
Babbitt v. Oglala Sioux Tribal Public Safety Dept., 194 F.3d 1374 (Fed. Cir. 1999)	3
Bath Iron Works Corp. v. United States, 20 F.3d 1567 (Fed. Cir. 1994)	17
Beverly Comm. Hosp. v. Belshe, 132 F.3d 1259 (9th Cir. 1997)	21, 22
Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539 (Ct. Cl. 1980)	3, 15, 16, 17
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986)	14
Brown v. Marquette Sav. and Loan Ass'n, 686 F.2d 608 (7th Cir. 1982)	21
Callejas v. McMahon, 750 F.2d 729 (9th Cir. 1984)	21
Ferris v. United States, 27 Ct. Cl. 542 (1892)	16
Franconia Assoc. v. United States, 122 S. Ct. 1993 (2002)	2, 12, 23
INS v. St. Cyr, 533 U.S. 289 (2001)	19, 23
Int'l Union v. Donovan, 746 F.2d 855 (D.C. Cir. 1984)	3, 16, 18
Javierre v. Central Altagracia, 217 U.S. 502 (1910)	19
Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990)	19
Lincoln v. Vigil, 508 U.S. 182 (1993)	18
Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887 (1st Cir. 1992)	21
Lopez v. A.C.&S., Inc., 858 F.2d 712 (Fed. Cir. 1988)	17
Lynch v. United States, 292 U.S. 571 (1934)	12, 14
Massachusetts Bay Trans. Auth. v. United States, 254 F.3d 1367 (Fed. Cir. 2001)	20

TABLE OF AUTHORITIES—Continued

	Page
Mobil Oil Exploration and Producing Southeast Inc. v. United States, 530 U.S. 604 (2000)	2, 12, 23
Murray v. Charleston, 96 U.S. 432 (1877)	13
New Valley Corp. v. United States, 119 F.3d 1576 (Fed. Cir. 1997)	20
N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267 (1974)	20
NCNB Texas Nat'l Bank v. Cowden, 895 F.2d 1488 (5th Cir. 1990)	21
The Padbloc Company, Inc. v. United States, 161 Ct. Cl. 369 (1963)	20
Paramount Health Systems, Inc. v. Wright, 138 F.3d 706 (7th Cir. 1998)	22
Perry v. United States, 294 U.S. 330 (1935)	14
Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272 (11th Cir. 1999)	22
Ramah Navajo Chapter v. Babbitt, 50 F. Supp. 2d 1091 (D. NM 1999)	4
Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997)	6
Ramah Navajo Chapter v. Norton, __ F. Supp. 2d __, 2002 WL 32005254 (D. NM Dec. 6, 2002).	4
Ramah Navajo School Bd. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996)	6
Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969)	20, 21
S. A. Healy Co. v. United States, 576 F.2d 299 (Ct. Cl. 1978)	16
South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982)	15

TABLE OF AUTHORITIES—Continued

	Page
Shoshone-Bannock Tribes v. Shalala, 988 F. Supp. 1306 (D. Or. 1997), *modified* 999 F. Supp. 1395 (D. Or. 1998), *on remand*, 58 F. Supp. 2d 1191 (D. Or. 1999), *rev'd sub nom., Shoshone-Bannock Tribes v. Secretary, Dep't of Health and Human Services*, 279 F.3d 660 (9th Cir. 2002)	4, 14
United Pacific Ins. Co. v. United States, 497 F.2d 1402 (Ct. Cl. 1974)	20
United States v. Bekins, 304 U.S. 27 (1938)	12
United States v. Montgomery Co. Md., 761 F.2d 998 (4th Cir. 1985)	21
United States v. Winstar, 518 U.S. 839 (1996)	*passim*
STATUTES	
25 U.S.C. § 450 *et seq*	2
25 U.S.C. § 450a(b)	5
25 U.S.C. § 450b(f)	5
25 U.S.C. § 450f(a)(1)	5
25 U.S.C. § 450j-1(a)	5, 16
25 U.S.C. § 450j-1(a)(1)	5
25 U.S.C. § 450j-1(a)(2)	5
25 U.S.C. § 450j-1(a)(3)	5
25 U.S.C. § 450j-1(a)(3)(A)(i)	6
25 U.S.C. § 450j-1(a)(3)(A)(ii)	5
25 U.S.C. § 450j-1(a)(5)	5
25 U.S.C. § 450j-1(b)	7, 10
25 U.S.C. § 450j-1(b)(1)	6
25 U.S.C. § 450j-1(b)(3)	6
25 U.S.C. § 450j-1(b)(4)	6
25 U.S.C. § 450j-1(g)	5, 16
25 U.S.C. § 450*l*(c), sec. 1(a)(2)	7, 20
25 U.S.C. § 450*l*(c), sec. 1(b)(4)	5, 16

TABLE OF AUTHORITIES—Continued

	Page
25 U.S.C. § 450m-1(a)	5, 9
25 U.S.C. § 450m-1(d)	5, 9
28 U.S.C. § 1254(1)	2
31 U.S.C. § 1304	17
41 U.S.C. § 601 *et seq.* ("Contract Disputes Act")	5, 9
41 U.S.C. § 612(a)	17
Pub. L. 104-134, 110 Stat. 1321 (1996)	7
Pub. L. 104-208, 110 Stat. 3009 (1996)	7
Pub. L. 105-277, § 314, 112 Stat. 2681-288 (1998)	*passim*
RULES	
S. Ct. Rule 35	ii
LEGISLATIVE MATERIALS	
S. Rep. 100-274 (1987)	6
S. Rep. 104-125 (1995)	17
S. Rep. 104-319 (1996)	17
COMPTROLLER GENERAL OPINIONS	
LTV Aerospace Corp., 55 Comp. Gen 307 (1975)	18
OTHER AUTHORITIES	
OMB Circular A-34 (2000), *available at* http://clinton4.nara.gov/media/pdf/a034/a-34.pdf	13
PRESIDENT'S BUDGET FOR FISCAL YEAR 1998 (Jan. 1997), Budget Appendix, *available at* http://w3.access.gpo.gov/usbudget/fy1998 /app_down.html	7

TABLE OF AUTHORITIES—Continued

	Page
PRESIDENT'S BUDGET FOR FISCAL YEAR 1999 (Jan. 1998), Budget Appendix, *available at* http://w3.access.gpo.gov/usbudget/fy1999/app_down.html	7
U.S. General Accounting Office, Principles of Federal Appropriations Law (*available on* Westlaw under "GAO REDBOOK")	13, 15, 16, 18

IN THE

Supreme Court of the United States

No. 02-__

CHEROKEE NATION and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA;
TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes of the Duck Valley Reservation in Nevada petition for a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit opinion is reported at 311 F.3d 1054 and reprinted in the Appendix hereto ("App.") at 1a. That opinion affirmed the Order of the District Court for the Eastern District of Oklahoma which is reported at 190 F. Supp. 2d 1248 and reprinted at App. 24a.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2002. App. 1a. A timely petition for rehearing *en banc* was denied on January 22, 2003. App. 51a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Indian Self-Determination and Education Assistance Act of 1975, as amended ("ISDA" or "Act"), 25 U.S.C. § 450 *et seq.*, and the fiscal year ("FY") 1996 and 1997 Appropriations Acts are reprinted at App. 53a-77a.

INTRODUCTION

This case presents issues of extraordinary importance to the federal government's reliability as a contracting party, and to the sanctity of government contracts. Three times in recent years this Court has been forced to compel the Federal Government to respect its contracting parties' rights in order to safeguard the government's long-term interest in ensuring a reliable source of providers of goods and services. *See Franconia Assoc. v. United States*, 122 S. Ct. 1993 (2002); *Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000); *United States v. Winstar*, 518 U.S. 839 (1996). This case is the next logical step in the sequence begun by those decisions.

At issue here is a dispute thrust upon two Indian tribes that contracted with the United States to operate federal hospitals and clinics at a price fixed by statute and the relevant contracts. In each instance, as with hundreds of other Indian tribes, the United States Indian Health Service initially had sufficient funds to pay the contracts but allocated those appropriations instead to other discretionary agency expenses, including expenses Congress by statute expressly prohibited

the agency from favoring over the contracts. The key issue is whether a federal agency may unilaterally cancel the United States' contract obligations by spending its money elsewhere.

The Tenth Circuit held the United States free of any liability whatsoever for its failure to pay fully on the contracts. In a ruling with profound implications for the sanctity of all government contracts, the Tenth Circuit did so first by seizing upon mere appropriations committee language—what Justice Scalia has called the "entrails of legislative history,"[1]—to permit a government agency to escape altogether its contract obligations. Then, as a backstop, the court below sanctioned Congress' returning years later and retroactively repudiating the United States' contractual commitments with impunity. In so ruling the circuit court has jeopardized the implementation of hundreds of government contracts with Indian tribes throughout the Nation, while also calling into question the nature of the United States' obligation to all other government contractors.

All of this comes as a stunning surprise, for it has long been the law of the Federal Circuit that government contract obligations must be paid out of unrestricted agency appropriations that are legally available for that purpose, even if doing so requires internal agency rebudgeting. *E.g.*, *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980). That court has long held that when the government fails to use unrestricted money, it is liable in damages. *Id.* Thus, even if the government's contract obligations are limited by available appropriations,[2] the United States cannot invoke that limitation without an express congressional limitation in an appropriations act. *Babbitt v. Oglala Sioux Tribal Public Safety Dept.*, 194 F.3d 1374 (Fed.

---

[1] *Int'l Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984).

[2] There are at least 50 statutes that unambiguously limit an agency's contracting authority to the availability of appropriations. App. 78a-87a.

Cir. 1999); *accord Shoshone-Bannock Tribes v. Secretary*, 279 F.3d 660 (9th Cir. 2002). Such a congressional limitation was notably absent here with respect to ongoing ISDA contracts with the Indian Health Service. Indeed, in recognition of those very rules, the United States has already settled virtually *identical* breach of contract claims against IHS's sister agency, the Bureau of Indian Affairs ("BIA"), on a class basis.[3] The Tenth Circuit's decision contravenes these well-established rules, converting government contracts into discretionary grants dependent on the whim of government agencies to spend or not to spend unrestricted appropriations on non-contractual obligations first. Accordingly, this Court should grant the petition and reaffirm the sanctity of government contracts and the responsibilities incumbent upon the government when it agrees to become a contracting party.

STATEMENT OF THE CASE

1a. There are 329 Indian tribes and inter-tribal organizations in the United States that annually contract with the U.S. Indian Health Service ("IHS") under the ISDA to administer its diverse health care programs. Most of these programs are operated on economically depressed rural Indian reservations situated in 35 states. Each summer IHS enters into these contracts in advance of appropriations for the coming fiscal year, typically to administer a remote IHS hospital, clinic or community health care program.

b. In 1975 Congress enacted the Indian Self-Determination Act, committing this Nation to "the establishment of a meaningful Indian self-determination policy which will permit an

[3] *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D. NM 1999) (first partial settlement); *Ramah Navajo Chapter v. Norton*, __ F. Supp. 2d __, 2002 WL 32005254, *3 (D. NM Dec. 6, 2002) (second partial settlement) (approving settlement of contract damage claims arising in years when (as here) Congress did not limit agency contract payments to "not to exceed" a given sum, and thus did not "cap" such payments).

orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 450a(b).

To implement this change in federal Indian policy, Congress "directed" the Secretary, "upon the request of any Indian tribe . . . to enter into a self-determination contract." *Id.* § 450f(a)(1) (emph. added). Under an ISDA contract the Secretary is then required to divest himself both of the authority to operate the contracted programs, and of all funding associated with those programs. *Id.* §§ 450f(a)(1), 450j-1(a)(1). In the event of a dispute, the Contract Disputes Act provides a remedy in damages. *Id.* §§ 450m-1(a),(d) (referencing 41 U.S.C. § 601 *et seq.*).

c. Congress in the ISDA required that "[u]pon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [§ 450j-1(a)]," *id.* § 450j-1(g) (emph. added), and it mandated that the contract amount "shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)]." *Id.* § 450*l*(c), sec. 1(b)(4) (emph. added). Section 450j-1(a), in turn, requires in paragraph (1) that "[t]he amount of funds provided under the terms of self-determination contracts . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . for the period covered by the contract," and in paragraph (2) that "[t]here shall be added to the amount required by paragraph (1) contract support costs." (Emph. added.) *See also id.* §§ 450j-1(a)(2), (3) & (5) (describing the required "contract support costs" that "shall be added" to the contract). These contract support costs include:

> (1) pooled "indirect costs" to administer all tribal operations (§§ 450b(f), 450j-1(a)(3)(A)(ii)); and

> (2) certain unpooled "direct" costs such as workers compensation insurance that specifically support the ISDA contract (§ 450j-1(a)(3)(A)(i)).

The described "contract support costs" cover the "fixed" overhead costs tribal contractors must incur to carry out these federal contracts[4]—costs which, when unreimbursed, must be absorbed through program reductions. Congress in 1988 added these contract support cost payment provisions because IHS's historic underpayment of those costs had become "the single most serious problem with implementation of the Indian self-determination policy," S. Rep. 100-274, at 8 (1987). *See also Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996) ("[IHS and BIA] . . . 'systematically violat[ed]' the Tribes' rights in the area of indirect costs"), quoting S. Rep. 100-274, at 37. The Senate Committee added pointedly:

> Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.

S. Rep. 100-274, at 13. These measures were enacted to make clear that "[IHS] must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services." *Id.* at 12. *See also* 25 U.S.C. §§ 450j-1(b)(1), (3) & (4) (all prohibiting IHS underpayments of ISDA contracts to fund other agency operations).

Consistent with its retention of authority to make final decisions concerning appropriations, Congress also provided that IHS could spend funds only to the extent Congress appropriates to IHS funds that are legally "availab[le]" to carry out the ISDA:

> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to

[4] *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (describing these as "fixed" costs).

> the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

Id. § 450j-1(b). Finally, in 1994 Congress added a special mandatory rule of statutory construction to protect tribal contractors:

> (2) Purpose.—Each provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor * * *.

Id. § 450*l*(c), sec. 1(a)(2) (emph. added).

d. In FY1996 and FY1997 Congress appropriated to IHS lump-sum amounts of $1.75 billion and $1.81 billion, respectively, "to carry out . . . the Indian Self-Determination Act," including the payment of contract support costs to contractors under that Act. Pub. L. 104-134, 110 Stat. 1321-189 (1996) (FY1996); Pub. L. 104-208, 110 Stat. 3009-212 (1996) (FY1997). Neither appropriations act limited the payment of contract support costs for ongoing ISDA contracts, and thus (with the exception of four earmarks) the full appropriation was legally available to pay such costs. At the end of each year IHS recorded substantial unobligated balances of $76,000,000 (FY1996) and $98,000,000 (FY1997). (*See* PRESIDENT'S BUDGET FOR FISCAL YEAR 1998 (Jan. 1997), Budget Appendix at 500 (ident. code 24.40) (reporting $76,000,000 as the FY1996 "actual" "end of year" "unobligated balance available"); PRESIDENT'S BUDGET FOR FISCAL YEAR 1999 (Jan. 1998), Budget Appendix at 404 (reporting $98,000,000 as the FY1997 "actual" "end of year" "unobligated balance available").)

e. IHS has long operated the Owyhee Community Hospital on the remote Shoshone-Paiute Duck Valley Reservation in northern Nevada, along with a variety of community health programs. Similarly, in northeastern Oklahoma, IHS owns

the Stilwell and Sallisaw clinics and also funds "contract health care" ("CHC") physician referral programs and various community health programs, all within the Cherokee Nation's 7,000 square mile jurisdictional area.

As FY1996 approached, the Shoshone-Paiute Tribes entered into an ISDA funding agreement for the coming year under which the Tribes agreed to take over the administration of the Owyhee Hospital on the government's behalf, with the agency to pay for this undertaking in a single amount at the beginning of the year "[s]ubject only to the appropriation of funds by the Congress." App. 5a.[5] As subsequently adjusted to reflect actual Hospital appropriations, the parties' compact and funding agreement required IHS to pay the Tribes' fixed contract support costs totaling $2,035,066 associated with this portion of the contract. App. 8a-9a, 31a-32a. IHS never paid this sum. *Id.* In advance of FY1997, the Tribes once again contracted under the Act to be paid fully at the beginning of the year, and once again IHS failed to pay any of the Tribes' fixed contract support costs associated with the ongoing operation of the Hospital. *Id.* As a consequence, the Tribes were compelled to reduce patient care to cover the shortfall. App. 9a.

As FY1997 approached, the Cherokee Nation similarly contracted to operate the Stilwell and Sallisaw clinics, two CHC physician referral programs, and various other IHS programs. All but one of the two CHC programs had been

[5] *See also* Appellants' App. (10th Cir.) at 302 (Shoshone-Paiute Compact requiring an "advance lump sum" payment, "unless otherwise provided in a[n]. . . Annual Funding Agreement," "on or before ten calendar days after the date on which the [OMB] apportions the appropriations for that fiscal year"), 340 (Shoshone-Paiute FY1996 AFA requiring "[o]ne annual payment in lump sum to be made annually in advance (on October 1, 1995)"), 372 (Shoshone-Paiute FY1997 AFA requiring "[o]ne annual payment in lump sum to be made. . . within 20 working days of apportionment [by OMB]").

part of the Cherokee's ongoing contracted operations for several years. Like the Shoshone-Paiute Tribes, although the funding agreement and associated compact required that IHS fully pay the Cherokee's fixed contract support costs at the beginning of the year "[s]ubject only to the appropriation of funds by the Congress," App. 5a, 33a-34a,[6] IHS paid no contract support costs at all associated with the clinics and CHC programs, and it did not fully pay the Cherokee's fixed costs associated with other ongoing IHS programs also administered under the funding agreement.

2a. After exhausting their remedies under the Contract Disputes Act (41 U.S.C. § 601 *et seq.*) and 25 U.S.C. § 450m-1(d), the petitioners filed this breach of contract action against the United States for damages pursuant to § 450m-1(a). In the meantime, and on the heels of a contemporaneous defeat in the lower courts (*infra* at 14 n.9), IHS in 1998 secured from Congress "Section 314," an appropriations act rider purporting retroactively to declare that IHS appropriations in FY1996 and FY1997 had all along been legally unavailable to pay petitioners and other tribal contractors their full contract support costs due under their ISDA contracts:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the [BIA and IHS] by [the FY1994 through FY1998 appropriations acts] for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts . . . with

[6] *See also* Appellants' App. (10th Cir.) at 435 (Cherokee Nation FY1996 AFA requiring that "IHS request apportionment of 100% of total FY96 AFA funding in the first quarter [and] . . . within 21 days [to] process and make available . . . the apportioned amount").

> the [BIA or IHS] as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, ...

Pub. L. 105-277, § 314, 112 Stat. 2681-288 (1998) ("Section 314").

Pursuant to a pretrial plan temporarily deferring all discovery, the Tribes moved for partial summary judgment to establish as a matter of law that appropriations were legally available at the time to pay fully the Tribes' contracts, and that under *Winstar* Congress could not later retroactively alter the Tribes' contract rights by enacting Section 314. The Secretary cross-moved for summary judgment. With respect to the "ongoing" portions of the petitioners' annual contracts, the district court concluded that: (1) notwithstanding the utter silence in the appropriations acts, FY1996 and FY1997 appropriations for ongoing contract support costs had actually been "earmarked in appropriation committee reports," App. 46a, and (2) such appropriations were in any event "insufficient" because the agency eventually "spent" its appropriations on other things. *Id.*

b. Employing somewhat different reasoning, the Tenth Circuit affirmed. As an initial matter, the court concluded that under § 450j-1(b) the United States has no underlying obligation to a tribal contractor if appropriations are not legally available to the agency to pay the contractor. App. 12a-13a. Next, with respect to "ongoing" contracts the Circuit viewed the issue presented as one of fact, not law, to be determined in light of an agency affidavit the court read as asserting that "all of the money appropriated for fiscal years 1996 and 1997 was in fact spent, leaving a zero balance at the end of the year," and further "declar[ing] that 'reprogramming additional funds for contract support costs would have required IHS to use money otherwise dedicated to other purposes supporting health services delivery to tribes.'" *Id.* 14a-15a. (The court did not address the President's later

budgets to Congress reporting between $76,000,000 and $98,000,000 in unspent FY1996 and FY1997 IHS appropriations. *Supra* at 7.) As for the absence of any limiting earmarks in the two lump-sum appropriations acts, *supra* at 7,[7] the Tenth Circuit simply stated that "while the Tribes correctly argue that the earmark recommendations of a committee are not typically legally binding, the IHS is likewise not obligated to completely ignore them." App. 16a (footnote omitted). The court below also concluded that "[Section] 314 retroactively gave those committee earmarks binding authority," *id.* 16a n.8, adding later that "[Section 314] indicated that the earmarked amounts in the committee reports for ongoing CSCs were intended to be legally binding." *Id.* 21a.

REASONS FOR GRANTING THE PETITION

There are several compelling reasons for granting the petition, reflecting both the enormous national impact of this case on the United States' reliability as a contracting party, and the multiple conflicts the decision below creates with decisions of this Court and other courts of appeals.

I. THE QUESTIONS PRESENTED CONCERNING GOVERNMENT CONTRACTS ARE EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

1. It is difficult to overstate the importance of this case. It directly affects over 300 tribal contractors operating federal hospitals and other health facilities from Oklahoma to Alaska. Yet the stakes are even higher than that, for if, as the Tenth Circuit has held, a government agency can simply decide for itself when it has legally available appropriations to pay a

[7] *See also* App. 8a ("neither Act on its face restricted or limited the amount of funds, out of the lump-sum appropriation, available for [contract support costs] for ongoing programs") (emph. in original).

government contractor, then the whole concept of a government contract obligation has been eviscerated with disturbing consequences for thousands of federal contractors.

Such a sweeping ruling is "at odds with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies," *Winstar*, 518 U.S. at 883, and alone is a compelling reason to grant the petition. Borrowing from *Winstar*, "[i]njecting the opportunity for . . . litigation [over agency spending decisions] into every common contract action would . . . produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be 'of the essence of sovereignty' itself." *Id.* at 884, citing *United States v. Bekins*, 304 U.S. 27, 51-52 (1938). Permitting government agencies to avoid paying their just contract debts simply by choosing to spend their moneys elsewhere and then claiming poverty, frustrates the "[p]unctilious fulfillment of contractual obligations [which] is essential to the maintenance of the credit of public as well as private debtors." *Id.* at 884-85, quoting Justice Brandeis in *Lynch v. United States*, 292 U.S. 571, 580 (1934). And, it completely undermines the bedrock principle that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Franconia*, 122 S. Ct. at 2001, quoting *Mobil Oil*, 530 U.S. at 607 (internal quotations omitted).

The untold damage the Circuit's ruling may engender for all government contractors cannot be overemphasized. Now, each time a contractor signs a contract saying that payments are 'subject to the availability of appropriations' (as is the case in at least 50 other statutory schemes, App. 78a-87a), it will not be enough that Congress appropriates monies the agency can lawfully spend to pay the contractor (in terms of the familiar time-purpose-amount test governing the legal

availability of an appropriation[8]). Now, the contractor must also monitor the agency's daily expenditures and implore the agency to honor its contract before spending its monies elsewhere. Even then, there is no assurance the contractor will not be left holding the bag at the end of the year if all the money is gone. This proposition is not only ludicrous; it also defies the whole concept of a contract, for "'[a] [government's] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.'" *Winstar*, 518 U.S. at 913 (Breyer, J. concurring), quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1877). It is the penultimate "illusory promise." *Winstar*, 518 U.S. at 921 (Scalia, Kennedy & Thomas, JJ. concurring). And, it would be "madness" for contractors ever to enter into such agreements in the future. *Id.* at 864.

The magnitude of these implications alone is a compelling reason to grant the petition. *See Winstar*, 518 U.S. at 860 ("We took this case to consider the extent to which special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue here.").

2. An equally compelling reason to grant the petition is to review the Tenth Circuit's remarkable conclusion that Congress can immunize the government from liability for a class of contract costs it has come to regret simply by enacting a retroactive rider years after performance. Thus, in the midst of litigation, Congress can conveniently declare that the appropriations that were legally available at the time to pay those costs disappeared by fiat.

---

[8] U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ("APPROPRIATIONS LAW") at 4-2 (1991) (on Westlaw under "GAO REDBOOK"); OMB Cir. A-34 at 11.5 (2000) (answering: **"How can I tell whether appropriations are legally available?"**) (emph. in original).

The enactment of Section 314, a rider whose sole purpose is "self-relief"—strictly to save the government money on fully performed contracts it later found too expensive—crosses the sharp "line" this Court has drawn "between regulatory legislation that is relatively free of Government self-interest . . . and, on the other hand, statutes tainted by a governmental object of self-relief." *Winstar*, 518 U.S. at 896. It is precisely for this reason that this Court has held the government liable when "a substantial part of the impact"—here, indeed, all of the impact—"of the Government's action rendering performance impossible falls on its own contractual obligations." *Id.* at 898.

No ordinary contractor can simply choose one day not to pay its contracts, and correspondingly "this Court has previously rejected the argument that Congress has 'the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money.'" *Id.* at 917-18 (Breyer, J. concurring), citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986), *Perry v. United States*, 294 U.S. 330, 350-51 (1935), and *Lynch*, 292 U.S. at 576-77. Here, too, the suggestion that Congress can step in with impunity in the middle of litigation and cancel its own contract debts years after the fact, simply to save the government money and undo government defeats in the lower courts,[9] knows no limits. By "expanding the Government's opportunities for contractual abrogation," the decision below produces "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *Id.* at 884. The

[9] Section 314 was enacted in the wake of *Shoshone-Bannock Tribes v. Shalala*, 988 F. Supp. 1306 (D. Or. 1997), *modified* 999 F. Supp. 1395 (D. Or. 1998) (holding government liable for underpaying contract support costs). The case was subsequently reversed in part *sub nom.*, *Shoshone-Bannock Tribes v. Secretary*, 279 F.3d 660 (9th Cir. 2002), based largely on § 314.

wholesale disruption of existing doctrine and settled expectations embodied in the holding below compels this Court's review.

II. THE TENTH CIRCUIT DECISION CREATES A DESTABILIZING INTER-CIRCUIT CONFLICT REGARDING AN AGENCY'S DUTY TO MEET CONTRACT OBLIGATIONS OUT OF AVAILABLE APPROPRIATIONS, AND THE FORCE OF MERE APPROPRIATIONS COMMITTEE RECOMMENDATIONS IN GOVERNMENT CONTRACTING MATTERS.

1. The Tenth Circuit decision also creates a sharp conflict with the Federal Circuit regarding an agency's duty to honor its contractual commitments out of available appropriations. In *Blackhawk* (binding precedent within the Federal Circuit[10]), the then-Court of Claims held that once a legally availabie appropriation is enacted from which a contract payment is due, at that moment the contractor's right to be paid becomes "a vested right," 622 F.2d at 553, adding:

> Administrative barriers [regarding internal agency budgets and reprogrammings] of the sort which the Government's argument raises are purely of an in-house accounting nature and, as such are irrelevant to any determination respecting the availability of appropriated funds.

Id. at 552 n.9.[11] The Tenth Circuit's contrary holding—that the availability of an appropriation to pay a contract

[10] *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (*en banc*) ("adopt[ing] [as] an established body of law as precedent" "[t]hat body of law represented by the holdings of the Court of Claims and the Court of Customs and Patent Appeals announced before the close of business on September 30, 1982").

[11] *Blackhawk* is but an expression of standard appropriations law, *see, e.g.*, APPROPRIATIONS LAW at 2-25 - 26 (discussing *Blackhawk*). *See also*

obligation depends on how the agency chooses to spend that appropriation—is diametrically opposed to the standard appropriations rule applied in *Blackhawk*.[12] It is also contrary to the Court of Claims' holding that the government cannot claim poverty as a defense when the "agency simply did not make an adequate [appropriations] request" to cover its contract obligations and other agency expenditures in the first place. *S.A. Healy Co. v. United States*, 576 F.2d 299, 305 (Ct. Cl. 1978).[13] These are serious decisional conflicts

---

id. at 6-17 ("Where a contractor is but one party out of several to be paid from a general appropriation, the contractor is under no obligation to know the status or condition of the appropriation account on the government's books"); *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892) ("A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects.").

[12] The ISDA's provisions give special force here to the *Blackhawk* rule, because the Act commands that an ISDA contract must include "the full amount of funds to which the contractor is entitled under [25 U.S.C. § 450j-1(a)]," *see* § 450j-1(g), and directs that the amount of the contract "shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)]," *see* § 450*l*(c), sec. 1(b)(4) (emph. added). These measures establish a binding earmark that controls the agency's subsequent expenditure of its lump sum appropriation. This is so because "when an authorization establishes a minimum earmark ('not less than,' 'shall be available only'), and the related appropriation is a lump-sum appropriation which does not expressly mention the earmark . . . the agency must observe the earmark [set forth in the authorizing statute]." APPROPRIATIONS LAW at 2-42 - 43, citing 64 Comp. Gen. 388 (1985) (emph. added). *See also Int'l Union*, 746 F.2d at 861 n.5 ("An agency may, of course, be constrained to expend a certain portion of a lump sum appropriation . . . aris[ing]. . . from the terms of the substantive statute for which the appropriation was usable.")

[13] The situation is particularly absurd here when the President informs Congress that the agency actually has leftover and unobligated

between the court below and the Circuit invested with exclusive jurisdiction over virtually all other government contracts. This conflict gravely upsets the stability of government contracts, warranting review by this Court.

2. Similarly, the Tenth Circuit's reliance on appropriations committee recommendations[14] to excuse IHS from paying these ongoing contracts conflicts with the law of other circuits and this Court.

As noted in *Blackhawk*,

> the amounts requested or earmarked for the individual items that comprise the budget estimates presented to the Congress, and on the basis of which a lump-sum appropriation is subsequently enacted, *are not binding on the administrative officers* unless those items (and their amounts) are carried into the language of the appropriations act itself, see 17 Comp. Gen. 147, 150 (1937).

---

appropriations available. *Supra* at 7. In any event, the agency's subsequent exhaustion of its appropriation is no bar to an award of damages under 41 U.S.C. § 612(a) of the Contract Disputes Act. *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994) (describing the Judgment Fund established under 31 U.S.C. § 1304 to pay contract damage awards as "a central, government-wide judgment fund from which judicial tribunals administering or ordering judgments, awards, or settlements may order payments without being constrained by concerns of whether adequate funds existed at the agency level to satisfy the judgment"); *Lopez v. A.C.&S., Inc.*, 858 F.2d 712, 716 (Fed. Cir. 1988) ("courts and boards, in rendering judgment, are not required to investigate whether program funds are available" "to pay court judgments and appeal board awards").

[14] *E.g.* S. Rep. 104-125, at 94 (1995) (FY1996) ("The Committee recommends $153,040,000 for contract support, the same as the House") (emph. added); S. Rep. 104-319, at 90 (1996) (FY1997) ("The Committee recommends $160,660,000 for contract support") (emph. added).

622 F.2d at 547 n.6 (emph. added). Or, as Justice Scalia for the D.C. Circuit put it in *International Union*:

> Lump-sum appropriations are a common feature of the legislative landscape, and we are not prepared to approach their interpretation by assuming that they are inherently ambiguous, capable of meaning either that no funds *need* be spent on any particular included program, or (as the Secretary seems to assert here) that no funds *could* be spent on a particular one, or that the funds *must* be distributed among all included programs in a given fashion--all as the committee reports and other entrails of legislative history might suggest.

746 F.2d at 861 (emph. in original). Indeed, in this Court it was the IHS itself which successfully argued in *Lincoln v. Vigil* that:

> [W]here "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on" the agency.

508 U.S. 182, 192 (1993) (emph. added), quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975). This is but hornbook appropriations law, APPROPRIATIONS LAW at 6-159, and the Tenth Circuit's creation of a destabilizing new rule—that committee reports establish new binding guidelines on the rights of government contractors to be paid out of available lump-sum appropriations—compels review by this Court.

In sum, the Tenth Circuit's conclusion that IHS could escape its contract obligations by relying on appropriations committee recommendations is doubly in conflict with decisions of this Court and other circuits: (1) it conflicts with the

lump-sum rule governing when a contractor's rights vest, and (2) it conflicts with the lump-sum rule that committee reports establish no limitation on an agency's use of its lump-sum appropriation. This Court should grant the petition to bring the Tenth Circuit into conformity with the decisions of this Court, the Federal Circuit and the D.C. Circuit on a matter of extraordinary importance to all government contractors.

III. THE TENTH CIRCUIT DECISION REPRESENTS AN UNPRECEDENTED EXPANSION OF CONGRESS' POWER TO CLARIFY PRIOR AMBIGUOUS LAW INTO AN UNREVIEWABLE POWER UNILATERALLY TO ABROGATE CONTRACT RIGHTS.

The Tenth Circuit's conclusion that Congress can enact retroactive legislation that alters pre-existing law and contract terms in the guise of a "clarification"—though here it is the court of appeals, not Congress, that so characterized Section 314—is directly at odds with the law of other Circuits and this Court. To be sure, Congress can enact retroactive legislation, *INS v. St. Cyr*, 533 U.S. 289, 315-17 (2001), though the standard for doing so is appropriately high, *id.*, considering both the constitutional and contractual lines Congress may not cross.[15] And as *Winstar* instructs, Congress' power to impair vested contract rights is decidedly limited, for the United States is bound to its contracts as much as a private party, and no party to a contract can unilaterally declare what the contract means, including its ambiguous terms. Rather, well-settled contract rules are available to the courts for resolving such matters. *E.g.*, *Javierre v. Central Altagracia*, 217 U.S. 502, 507 (1910) (burden on those

---

[15] *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 856 (1990) (Scalia, J. concurring) (noting the Constitution "proscribes all retroactive application of punitive law . . . and prohibits (or requires compensation for) all retroactive laws that destroy vested rights").

"seeking to escape from the contract made by them on the ground of a condition subsequent, embodied in a proviso"); *Massachusetts Bay Trans. Auth. v. United States*, 254 F.3d 1367, 1373 (Fed. Cir. 2001) (party asserting impossibility has burden of proving it explored and exhausted alternatives); *New Valley Corp. v. United States*, 119 F.3d 1576, 1584 (Fed. Cir. 1997) ("exculpatory provision . . . must [be] construe[d] narrowly and strictly"); *United Pacific Ins. Co. v. United States*, 497 F.2d 1402, 1407 (Ct. Cl. 1974) (contractor's reasonable interpretation of ambiguous provision controls where government drafted the contract); *The Padbloc Company, Inc. v. United States*, 161 Ct. Cl. 369, 376-77 (1963) ("'We are not to suppose that one party was to be placed at the mercy of the other'" so as to "[give] the United States carte blanche."); *see also* 25 U.S.C. § 450*l*(c), sec. 1(a)(2) (ISDA contracts "shall be liberally construed for the benefit of the Contractor").

Although the Tenth Circuit cited no authority in support of Congress' apparent power to "clarify" whether IHS had a contractual duty to pay three years earlier, the nearest authority confirms only Congress' recognized power retroactively to clarify a genuine ambiguity in a prior regulatory enactment. *E.g.*, *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 380-81 (1969) (regulation of broadcasters under the Communications Act); *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) (regulation of labor relations under the Taft-Hartley Act). To extend *Red Lion* to the interpretation of government contracts—here, to permit the government years after performance and in the middle of litigation unilaterally and retroactively to declare what the contract means—would cut the heart out of this Court's government contracting jurisprudence and undo the bedrock principle that the government is to be treated just like any other private party in its contracting relations. The other Circuits have never taken *Red Lion* into this domain, and the Tenth Circuit's establishment of a more liberal *Red Lion* rule when

it comes to government contracts—an area where, if anything, the rules should be stricter—produces a serious intercircuit split warranting review by this Court.[16]

Even retroactive amendments to purely regulatory regimes can be problematic, and in considering *Red Lion* other Circuits have therefore recognized that "retroactive application" of a non-clarifying amendment "would pose a series of potential constitutional problems," *Beverly Comm. Hosp. v. Belshe*, 132 F.3d 1259, 1265 (9th Cir. 1997). Thus, even in the regulatory arena, care must be taken to draw a distinction between situations where Congress merely clarifies an earlier ambiguity (as in *Beverly*) and situations where Congress actually enacts a retroactive change impacting vested rights. After all, it is one thing to clarify an earlier law and quite another to change it, for no matter how a "clarification" may be cast, "WHITE cannot retrospectively be made to assert BLACK." *United States v. Montgomery Co. Md.*, 761 F.2d 998, 1003 (4th Cir. 1985). The other Circuits thus take care to confine *Red Lion* and its progeny to situations involving genuine clarifications. *E.g.*, *Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887 (1st Cir. 1992); *NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1500-01 (5th Cir. 1990); *Brown v. Marquette Sav. and Loan Ass'n*, 686 F.2d 608, 615 (7th Cir. 1982); *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984). The Eleventh Circuit put it well:

> Several factors are relevant when determining if an amendment clarifies, rather than effects a substantive change to, prior law. A significant factor is whether a conflict or ambiguity existed with respect to the interpretation of the relevant provision when the amendment

[16] *See Winstar*, 518 U.S. at 897 n.41 (where there is a "concern with governmental self-interest . . . 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate'") & 898 ("The greater the Government's self-interest, however, the more suspect becomes the [Government's] claim").

> was enacted. If such an ambiguity existed, courts view this as an indication that a subsequent amendment is intended to clarify, rather than change, the existing law. Second, courts may rely upon a declaration by the enacting body that its intent is to clarify the prior enactment.

Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272, 1283-84 (11th Cir. 1999) (citations omitted). *See also Beverly*, 132 F.3d at 1265-66 (subsequent statute, entitled "Clarification," was enacted in the wake of a "split of authority" regarding the admittedly inscrutable Social Security Act); *Paramount Health Systems, Inc. v. Wright*, 138 F.3d 706, 710 (7th Cir. 1998) (criticizing notion that "a disappointed litigant in a statutory case in a federal district court could scurry to Congress while the case was on appeal and request a 'clarifying' amendment that would reverse the interpretation that the district judge had given to the statute, even if that meaning was crystal clear").

The Tenth Circuit has changed all this, turning upside-down the narrow jurisprudence regarding retroactive clarifications. Under its formulation, the fact that contract rights are at issue is immaterial; the legislation at issue need not be cast as a clarification at all; there is no need for a history of judicial struggles with the earlier law's interpretation; and there is no need for any other indicia that something was ambiguous or confusing in the first place. Under the Tenth Circuit's view of it, even a law like Section 314 which has a telling "notwithstanding" clause—conveying Congress's intent plainly to change what would otherwise be the law and the government's contracting obligations under it—can judicially be reinterpreted to be a mere clarification. The actual clarity of the earlier law is unimportant. Nor does it matter that the only objective evidence suggests quite the contrary: that in the weeks following a defeat in other ISDA litigation finding IHS liable for underpaying contract support costs, *supra* at 14 n.9, IHS ran to Congress and secured

Section 314 in what the Tenth Circuit now announces was a successful effort to "clarify" the law retroactively and thus foreclose further liabilities. The Tenth Circuit's reformulation of the law governing retroactive clarifications shows no limits and sanctions precisely such profoundly unfair results.

Unless reversed, there will be no end to government agencies that suffer defeats in the lower courts turning to Congress for retroactive "notwithstanding" amendments to undo vested contractual and statutory rights. With the stroke of a pen appropriations that years earlier indisputably were legally available can now be made to disappear retroactively, along with the contract payment rights that had long ago vested upon enactment of those appropriations. Such an enormous and unprecedented expansion of Congress' power seriously erodes both this Court's careful protection of contract rights reflected in *Winstar*, *Mobil* and *Franconia*, and this Court's narrow retroactivity jurisprudence reflected in *St. Cyr*. Both the extreme consequences of such a proposition for all contractors dealing with the government, and the more limiting views from other Circuits concerning retroactive clarifications of regulatory measures, warrant granting certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

CARTER G. PHILLIPS
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

RIYAZ KANJI
KANJI & KATZEN
201 South Main St.
Ann Arbor, MI 48104
(734) 769-5400

LLOYD BENTON MILLER *
HARRY R. SACHSE
ARTHUR LAZARUS, JR., PC
MELANIE B. OSBORNE
NACOLE D. HESLEP
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20007
(202) 682-0240

* Counsel of Record

Counsel for Petitioners

APPENDICES

APPENDIX A

[Decided Nov. 26, 2002]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 01-7106

CHEROKEE NATION OF OKLAHOMA; SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Plaintiffs-Appellants,

v.

TOMMY G. THOMPSON, Secretary of Health and Human Services; MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District Court of Oklahoma

Before MURPHY, ANDERSON, and BALDOCK, Circuit Judges.

ANDERSON, Circuit Judge.

This case involves the adequacy of funding provided by the United States to plaintiffs, two Native American Tribes, for their performance of contracts operated under the Indian Self-Determination and Education Assistance Act. The Tribes

appeal the grant of summary judgment to the United States. We affirm.

BACKGROUND

Under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. §§ 450-450(n), as amended, the Secretary of Health and Human Services ("Secretary") may enter into contracts or compacts with Indian tribes (self-determination contracts) to permit the tribes to administer various programs that the Secretary would otherwise administer. The Act further stipulates that the Secretary will provide funding for the administration of those programs. The basic idea behind the ISDA is to promote tribal autonomy and self-determination by permitting tribes to operate programs previously operated by the federal government, but to ensure that they do not suffer a reduction in funding for those programs simply because they assume direct operation of them.

The Indian Health Service ("IHS") provides primary health care for Indians and Alaska natives throughout the United States. In fiscal year 1994, in accordance with the ISDA, plaintiffs, the Shoshone-Paiute and the Cherokee Nation Tribes of the Duck Valley Reservation, entered into Compacts of Self-Governance and associated Annual Funding Agreements with the Secretary to operate certain IHS programs for their members.

Under § 450j-1(a) of the ISDA, the Secretary is obligated to provide funding for those self-determination contracts or compacts[1] in an amount equal to what he would have provided were IHS to continue to provide health care services itself

[1]There is no material distinction for purposes of this appeal between an agreement called a "compact" and an agreement called a "contract." Accordingly, as the parties have done, we use the terms interchangeably.

directly. This is called the "Secretarial amount." 25 U.S.C. § 450j-1(a)(1). See Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338, 1341 (D.C. Cir. 1996) (describing the Secretarial amount as the "amount of funding that would have been appropriated for the federal government to operate the programs if they had not been turned over to the Tribe").

In addition to the Secretarial amount, the ISDA directs the Secretary to provide contract support costs ("CSC") to cover the direct and indirect expenses associated with operating the programs. The ISDA does not precisely define what CSC are.[2] We have observed that "[r]eviewing . . .the [ISDA] as a whole, . . . 'contract support costs' encompasses 'indirect costs' incurred by a tribal organization in carrying out a self-determination contract." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997). "Indirect costs" are, in turn, defined as those "incurred for a common or joint purpose benefiting more than one contract objective . . .," 25 U.S.C. § 450b(f), as contrasted with "direct program costs," which are those "that can be identified specifically with a particular

[2]The ISDA provides some general guidance as to what CSC are: "the reasonable costs for activities which must be carried on by a tribal organization as a contractor . . . but which

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or
(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

25 U.S.C. § 450j-1(a)(2). It also provides for the payment of CSC for "direct program expenses for the operation of the Federal program that is the subject of the contract," as well as "any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service or activity pursuant to the contract." 25 U.S.C. § 450j-1(a)(3)(A)(i), (ii).

contract objective," 25 U.S.C. § 450b(c). See Shoshone-Bannock Tribes v. Secretary, 279 F.3d 660, 663 n.5 (9th Cir. 2002); Ramah Navajo Chapter, 112 F.3d at 1457-58. As this case demonstrates, the adequacy of the funding provided for tribal indirect costs has proven to be a recurring and troublesome issue. See Ramah Navajo Chapter, 112 F.3d at 1462 ("The legislative history indicates one of the primary concerns of Congress in enacting the [1988] amendments [to the ISDA] was the chronic underfunding of tribal indirect costs.") (citing S.Rep. No. 100-274 at 8-13 (1987)). See United States General Accounting Office, Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed at p.3 (June 1999) (noting that while "Tribes' allowable contract support costs have tripled from 1989 through 1998 increasing from about $125 million to about $375 million. . . . Congress has not funded contract support to keep pace with these increases, resulting in funding shortfalls").

The ISDA provides a further and, in this case, significant caveat to the funding obligations: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." 25 U.S.C. § 450j-1(b); see also 25 U.S.C. § 450j(c) ("The amounts of [self-determination] contracts shall be subject to the availability of appropriations."). The first clause in § 450j-1(b) is called the "availability clause" and the second the "reduction clause."

Additionally, every self-determination contract entered into under the ISDA must either contain or incorporate by reference the provisions of a model agreement prescribed by the ISDA. 25 U.S.C. § 450*l*(a). The model agreement reiterates the availability clause, specifically providing that the amount

funded by the Secretary is "[s]ubject to the availability of appropriations. . . ." 25 U.S.C. § 450l (c) (describing § 1(b)(4) of model agreement). Accordingly, the compact with the Shoshone-Paiute Tribe contained the following clause:

> Funding Amount. Subject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to [25 U.S.C. § 450j-1] of the Indian Self-Determination and Education Assistance Act, as amended, the Secretary shall provide the total amounts specified in the Annual Funding Agreement.

Appellants' App. at 302. The compact with the Cherokee Nation contained virtually identical language. See id. at 425.

Additionally, the Annual Funding Agreement between the Shoshone-Paiutes and the Secretary included the following provision:

> Section 9 - Adjustments.
>
> (a) Due to Congressional Actions. The parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to adjustment due to Congressional action in appropriations Acts or other laws affecting availability of funds to the Indian Health Service and the Department of Health and Human Services. Upon enactment of any such Act or law, the amount of funding provided to the Tribes in this Agreement shall be adjusted as necessary, after the Tribes have been notified of such pending action and subject to any rights which the Tribes may have under this Agreement, the Compact, or the law.

Appellants' App. at 342. The Annual Funding Agreement between the Cherokee Nation and the Secretary stated as follows:

> The parties agree that adjustments may be appropriate due to unanticipated Congressional action. Upon enactment of

relevant Appropriations Acts, the adjustments may be negotiated as necessary; provided, however, the Nation shall be notified and consulted in advance of any proposed adjustments. It is recognized by the parties that circumstances may arise where funding variances or other changes or modifications may be needed, and the parties shall negotiate same in good faith. Provided, however, this AFA shall not be modified to decrease or delay any funding except pursuant to mutual agreement of the parties.

Appellants' App. at 450.

Recognizing that there could be numerous tribes competing for funding, the ISDA gave the IHS some flexibility in determining how to allocate funds: "[p]ayments of any grants or under any contracts pursuant to section 450f and 450h of this title may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this part." 25 U.S.C. § 450j(b). This case concerns a dispute about the allocation of CSC funds to the plaintiff Tribes for fiscal years 1996 and 1997.

In allocating CSCs for those years, IHS categorized contracts with tribes into two broad groups "existing" contracts and "new or expanded" contracts.[3] Existing contracts were those that a tribe had been operating in a prior year or years. IHS allocated CSCs to existing contracts generally in accordance with the recommendations contained in appropriation committee reports. New or expanded contracts were those involving programs which tribes had never operated before.

[3]IHS' methodology in awarding CSC funds was explained in an internal agency guideline call the Indian Self-Determination Memorandum 92-2. This memorandum was superseded in 1996 by IHS Circular No. 96-04, which contains essentially the same methodology.

With respect to these new or expanded contracts, IHS took the ISD Fund Congress had appropriated for the "transitional costs of initial or expanded tribal contracts" and established a priority list based on the date the tribe requested funding for a new or expanded contract. Each year IHS would fully pay for CSCs for new or expanded contracts at the top of the priority list, and continue down the list until the ISD Fund was fully depleted. Contracts that had been so funded were removed from the list, and those below it advanced. In practice, the funds for new or expanded contracts were depleted before every tribe on the priority list received its CSC funding for new or expanded programs.

At the end of each year, the IHS would summarize the full CSC needs of each contracting tribe, in the prior year, calculate how much the IHS paid toward those CSC needs, and determine the resulting shortfall, if any. The Director of the Division of Financial Management for the IHS stated that in 1997 there was a CSC funding shortfall of $81,996,000 and in 1996 a CSC funding shortfall of $43,000,000. Fitzpatrick Decl. at ¶ 8, Appellants' App. at 530.

As indicated, this case concerns a dispute about the amount of CSCs provided to the plaintiff Tribes in fiscal years 1996 and 1997.[4] For fiscal year 1996, the House Committee on Appropriations recommended that approximately $1.7 billion be appropriated to IHS, with $153 million to be spent on CSCs for existing self-determination contracts, and $7.5 million on such costs for new or expanded self-determination contracts. See H.R.Rep. No. 104-173, at 97 (1995). As actually enacted, the Appropriations Act for 1996 appropriated the recommended $1.7 billion, of which approximately $1.374 billion was

[4]Plaintiffs aver that the Shoshone-Paiute tribe was underfunded in 1996 and 1997, and that the Cherokee Nation tribe was underfunded in 1997.

unrestricted. Of that $1.374 billion, however, $7.5 million "shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-189 (1996).

For fiscal year 1997, Congress similarly appropriated a lump sum of approximately $1.8 billion to IHS for administration of the ISDA, of which $160,000,000 had been earmarked by the appropriations committee report for CSCs for existing contracts. See S. Rep. No. 104-319, at 90 (1996). As with the 1996 appropriation, in the actual Appropriations Act, Congress appropriated the recommended $1.8 billion, with $1.426 billion unrestricted, and, as in 1996, it allocated $7.5 million to the ISD Fund for new or expanded contracts under the ISDA. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-212, 3009-213 (1996). Thus, neither Act on its face restricted or limited the amount of funds, out of the lump-sum appropriation, available for CSCs for ongoing programs. Both designated $7.5 million to "remain available until expended" in the ISD Fund to pay for CSCs for new or expanded contracts.

In fiscal years 1996 and 1997, the requests for CSCs for new and expanded contracts exceeded the $7.5 million allocated. As a result, full CSC funding for such new and expanded contracts was delayed and/or not paid at all for some tribes, including the plaintiffs. Additionally, plaintiffs allege that CSC funding for their ongoing contracts was inadequate. The Cherokee Nation claims that, in total, it was not paid $3.4 million in CSC for fiscal year 1997. See First Amended Comp. at ¶¶ 31, 32; Appellants' App. at 44. The Shoshone-Paiute Tribe claims it was not paid $3.5 million in CSC for fiscal

years 1996 and 1997. See id. at ¶¶ 14, 15; Appellants' App. at 39-40; Fitzpatrick Decl. at 18, Appellants' App. at 534-35. Both Tribes assert that, because of these budget shortfalls, they were compelled to make substantial cuts in their programs.

On October 21, 1998, Congress passed the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681-288 (1998), which imposed a mandatory cap on the total amount of CSC funding for new and expanded programs. Section 314 states in part:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Law 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes. . . .

The public laws referenced in § 314 included the 1996 and 1997 Appropriations Acts which, as indicated, had appropriated $7.5 million for CSCs for new and expanded programs. Additionally, the committee reports which preceded those laws had earmarked certain amounts for CSCs for ongoing programs. In 1998 Congress also enacted a one-year moratorium barring the Secretary from entering into further ISDA contracts. See id., § 328; see also Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 1001 (10th Cir.), modified on rehearing 257 F.3d 1158 (2001).

Alleging that the Secretary failed to fully pay all of their CSCs associated with both the ongoing portions of their

compacts with the IHS and the initial and expanded portions of their compacts, the plaintiff Tribes brought administrative claims against the Secretary under the Contract Disputes Act, 41 U.S.C. §§ 601-13. When that failed to resolve the dispute, the Tribes filed this action in March 1999, seeking damages and declaratory relief against the United States, the Secretary, and the Director of the IHS. All parties filed motions for summary judgment, and, on June 25, 2001, the district court denied the Tribes' motions, granted the United States' motion for summary judgment and dismissed the case.

Concluding that the language of the ISDA was clear and unambiguous, the district court reasoned as follows:

> This court finds the contracts at issue are conditioned on the IHS having sufficient funding. This court does not agree with the interpretation espoused by plaintiffs that the language in the Self-Determination Contracts which states that contract support costs are "subject to availability of appropriations" limits only the Secretary's ministerial duty to disburse funds but not her ultimate liability for full contract support costs.... To adopt plaintiffs' interpretation would render the phrase "availability of appropriations" meaningless.

Cherokee Nation v. United States, 190 F. Supp.2d 1248, 1259 (E.D. Okla. 2001). The court further found that:

> the money appropriated to IHS for fiscal years 1996 and 1997 was already committed to pay for funding of recurring costs and other mandatory obligations. Thus, there were simply insufficient appropriations to pay the contract support costs requested by plaintiffs. Further, the IHS could not use any of its annual appropriations to pay plaintiffs' contract supports costs without impairing its ability to discharge its responsibilities with respect to other tribes and individual Indians.

Id. at 1260. The court also held that § 314 limited the funds available for CSCs for new or expanded programs:

> Section 314 imposes a $7.5 million cap on IHS' payments each year to tribes for contract support costs for their new and expanded programs from 1994 through 1998. This amount had already been disbursed for the years in question. Section 314 bars further payments for those years since no appropriations were available.

Id. at 1262. Finally, the court rejected plaintiffs' argument that, regardless of the level of appropriations, the government was nonetheless liable to them under contract principles for their full CSCs.

Plaintiff Tribes appeal, arguing: (1) sufficient appropriations were legally available such that the Secretary was able to and should have paid plaintiffs' full CSCs for fiscal years 1996 and 1997 and neither the availability-of-appropriations clause nor the reduction clause contained in 25 U.S.C. § 450j-1(b) provide a defense to that obligation; (2) section 314 does not excuse the failure to pay because it would amount to a retroactive extinguishment of vested contractual and statutory rights, thereby, at a minimum, exposing the government to liability in damages; and (3) plaintiffs' contracts under the ISDA obligated the IHS to secure adequate appropriations to satisfy its contractual obligations.

We review the grant of summary judgment de novo, applying the same standard as did the district court. Ramah Navajo Chapter, 112 F.3d at 1460. Summary judgment is appropriately granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "We examine the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party." Ramah Navajo Chapter, 112 F.3d at 1460.

DISCUSSION

"The starting point in any case involving statutory construction is the language of the statute itself." Id. The government argues that § 450j- 1(b) clearly and unambiguously states that the IHS' obligation to provide full funding for ongoing and/or new and expanded CSC for plaintiffs' programs in fiscal years 1996 and 1997 is subject to the availability of appropriations by Congress, and, since there were insufficient appropriations to fully pay those costs, IHS incurs no liability for its failure to so pay. It further argues that three circuit courts have so held, and we should align ourselves with those courts.

We begin, therefore, with the relevant language of the ISDA: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe. . . ." 45 U.S.C. § 450j- 1(b). As the statute plainly states, the *"provision* of funds" is "*subject to* the availability of appropriations." Id. (emphasis added). This is so "[n]otwithstanding *any other provision* " of the Act. Id. (emphasis added).

This language is "clear and unambiguous." Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374, 1378 (Fed.Cir. 1999). By means of this express language, "Congress has plainly excluded the possibility of construing the contract support costs provision as an entitlement that exists independently of whether Congress appropriates money to cover it." Shoshone-Bannock Tribes, 279 F.3d at 665. We agree with those courts, as well as the District of Columbia Circuit, which also found the statutory language clear and compelling:

> [W]e read the subject-to-availability-of-funds provision to mean precisely what it says: the Secretary need only distribute the amount of money appropriated by Congress under the Act, and need not take money intended to serve non-CSF purposes under the ISDA in order to meet his responsibility to allocate CSF.

Ramah Navajo Sch. Bd., 87 F.3d at 1345. To hold otherwise would "render the subject-to-appropriations language of § 450j-1(b) meaningless." Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d at 1378.

Plaintiffs respond that appropriations *were,* in fact, "legally available" to fully pay their CSCs. Thus, they argue that the availability clause does not excuse the government's failure to fully pay their CSCs for their ongoing programs/contracts or their new or expanded ones. Because the arguments are slightly different with respect to CSC funding for ongoing contracts, as contrasted with new or expanded ones, we address each set of contracts in turn.

I. Ongoing Contract CSCs

Plaintiffs make a series of arguments about why, notwithstanding the availability clause, they were entitled to full funding of CSCs for ongoing programs. First, they argue that the appropriations for ongoing CSCs at issue here were legally available because they were part of a lump-sum unrestricted appropriation for IHS, and the fact that the appropriations committee reports recommended that CSCs for ongoing contracts be limited to $153 million in 1976 and $160 million in 1997 is irrelevant in the face of the silence of the Appropriation Acts on the issue. They also argue that CSC payments cannot "take a back-seat to IHS's discretionary decisions about how best to spend its lump-sum appropriations" without violating both the spirit of the ISDA as a whole and the legislative history of the 1988 amendments to

the ISDA. Appellants' Op. Br. at 28. Those amendments include § 450j-1(b), which itself reflected "a studied congressional intent to *deny* the Secretary *all* discretion over contract funding decisions." Id. Finally, they argue the district court erred in relying on the recommendations of the appropriations committees as providing an "earmark" capping the amount available for ongoing CSCs.

Based on the materials before it at the summary judgment stage, the district court found that "[m]ost of IHS' annual appropriations are distributed to area offices for the payment of recurring costs . . . [which are costs that] occur automatically from year to year and must be funded without reduction." Cherokee Nation, 190 F. Supp.2d at 1250 (citing the Declaration of Carl Fitzpatrick, the Director of the Division of Financial Management for the IHS). Thus, "[i]n fiscal year 1997, IHS allocated to the Area Offices approximately $1,368,893,059 of the total approximately $1.8 billion annual appropriation on a recurring basis. . . ." Fitzpatrick Decl. at ¶ 10, Appellants' App. at 530-31. For fiscal year 1996, the IHS allocated approximately $1,313,990,083 on a recurring basis. Id., Appellants' App. at 531.

Further, in accordance with the appropriation committee report recommendations, the IHS allocated to area offices for tribal contract CSCs $153,040,000 in 1996 and $160,660,000 in 1997. Id. at ¶ 17, Appellants' App. at 534. Fitzpatrick further declared that "reprogramming additional funds for contract support costs would have required IHS to use money otherwise dedicated to other purposes supporting health services delivery to tribes." Id. at ¶ 17, Appellant's App. at 534. Finally, Fitzpatrick stated that all of the money appropriated for fiscal years 1996 and 1997 was in fact spent, leaving a zero balance at the end of the year.[5]

While plaintiffs argue that the district court's conclusions on these points are unsupported or somehow erroneous, they do not directly challenge the validity or accuracy of the Fitzpatrick Declaration, nor explain why the district court was not entitled to rely on it in ruling on the motions for summary judgment. The Fitzpatrick Declaration demonstrated that providing to the plaintiff Tribes their entire CSCs for ongoing contracts would have necessitated a reduction in funding for other tribal programs, or a reprogramming of such funds.[6]

Plaintiffs argue that the government is simply making an "after-the-fact" justification for its failure to fully pay CSCs, once it decided to spend all the money appropriated to it on other items. They argue that their contractual and statutory entitlement to such full funding vested immediately, at the beginning of each fiscal year, and, presumably, ahead of other

---

[5]Plaintiffs dispute the validity of the assertion that no moneys were left over from the appropriations for IHS in 1996 and 1997. In support of their allegation that there was not a zero balance, however, the Tribes refer us to a document in their appendix titled "Procedures for Allocating Prior Year Unobligated Balances to Satisfy CSC Shortfalls." Appellants' App. at 489. Plaintiffs assert it is dated November 1998, although no date appears on the document. Moreover, it is labeled "DRAFT *For Discussion Purposes Only*" and, in any event, does not support plaintiffs' assertion that there were, in fact, balances remaining from fiscal years 1996 and 1997. Thus, this document fails to rebut the Fitzpatrick Declaration's statement that there was a zero balance.

[6]Plaintiffs assert that the government's "'reduction clause' defense is nothing but a *post hoc* rationalization for actions that patently violated the Tribes' rights." Appellants' Op. Br. at 38 n.61. However, as the government points out, the record demonstrates that the IHS made its budgetary allocations for all funds, including CSCs, at the beginning of the year. See Fitzpatrick Decl. ¶ 4 & Ex. F., Appellants' App. at 528, 540-43.

IHS obligations. But, as the government points out, plaintiffs provide no support for that assertion, nor would that make sense, given the structure of the compacts plaintiffs have with the government, as well as the IHS' numerous other mandatory financial obligations.[7]

Moreover, while the Tribes correctly argue that the earmark recommendations of a committee are not typically legally binding,[8] the IHS is likewise not obligated to completely ignore them. Nothing suggests that the IHS awarded the amount it did for ongoing program CSCs because it felt *legally* obligated to do so because of the committee report recommendations, as opposed to making that allocation as an exercise of the limited discretion inevitably vested in it. See Ramah Navajo Chap., 112 F.3d at 1463 (noting that 1988 amendments retain for government some discretion in awarding CSCs); Ramah Navajo Sch. Bd., Inc., 87 F.3d at 1346 n.11 (noting the very limited discretion the Secretary has to award insufficient CSC funds under the ISDA).[9] In sum, we agree with the district

---

[7]Both the ISDA, which authorizes the contracts at issue, and the contracts themselves, explicitly make the availability of the sums owed to the Tribes subject to the availability of appropriations. Thus, it is implicit that, whenever the contracts stated the CSC funds were due, only those funds were due which had sufficient appropriations "backing" them. Further, plaintiffs fail to explain why their claims for CSC funds should take priority over all other tribal claims for funds from IHS.

[8]As we discuss infra, § 314 retroactively gave those committee earmarks binding authority.

[9]Plaintiffs argue that the 1988 amendments to the ISDA reflect a desire to severely limit the Secretary's discretion in allocating CSC funds. We agree. As the D.C. Circuit observed, "Congress left the Secretary with as little discretion as feasible in the allocation of CS [C]." Ramah Navajo Sch. Bd., 87 F.3d at 1344. However, as the discussion in Ramah Navajo Sch. Bd. indicates, we must bear in mind the context in which CSCs are allocated.

(continued...)

court that funding for the Tribes' ongoing CSCs was subject to the availability of appropriations from Congress, and there were insufficient appropriations to fully pay those CSCs.

II. New or Expanded Contracts

As all parties agree, the 1996 and 1997 Appropriations Acts specifically addressed funding for new or expanded tribal contracts: "$7,500,000 shall remain available until expended [for the ISD Fund] . . . for the transitional costs of initial or expanded tribal contracts." 110 Stat. 1321-189, 110 Stat. 3009-212, 213. As all parties also agree, tribes requested far more than the $7.5 million available for new or expanded contracts, and, pursuant to its queue or priority list system, the IHS awarded CSC funds to tribes ahead of plaintiffs on the priority list.

Plaintiffs argue that the "shall remain available" language placed no cap or limit on the amount of CSC funds which could be awarded to tribes for new or expanded programs, so IHS' failure to award more than the $7.5 million violated both the ISDA and plaintiffs' compacts with the government. We disagree.

The Ninth Circuit in Shoshone-Bannock Tribes considered this very issue. It concluded as follows:

> The appropriation language is arguably ambiguous. The language, $7.5 million "shall remain available until

---

[9](...continued)
Where there are sufficient appropriations to fully fund all CSCs, "the Act informs the Secretary exactly how the full funding should be allocated." Id. at 1348. In the face of an insufficient appropriation, the Secretary must "follow as closely as possible the allocation plan Congress designed in anticipation of *full* funding." Id. Thus, where appropriations are insufficient, the Secretary has a very limited discretion to allocate those funds in a manner consistent with the ISDA.

expended" is not an unambiguous cap, as was the "of which not to exceed" language of the [1995] appropriation. By themselves, the words might mean that $7.5 million is available, without necessarily implying that other money is unavailable. Alternatively, they could mean that, of the total appropriation, only $7.5 million is available for the contract support costs. The House Appropriations Committee provided explanatory language in its report on the appropriation. The Committee Report speaks to a concern it had "to contain the cost escalation in contract support costs," and says "[t]he Committee has provided $7,500,000 for the Indian Self-Determination Fund . . . to be used for new and expanded contracts." This Committee Report language lends itself to the second reading, that only $7.5 million is available, not the first. The most natural reading is that the Committee gave attention to how much of the total appropriation should go to contract support costs for new and expanded contracts and decided that $7.5 million was all they wanted to spend.

Shoshone-Bannock Tribes, 279 F.3d at 666 (footnote omitted).

The Ninth Circuit found further support for its conclusion in § 314, by which, the court opined, "Congress eliminated the ambiguity retroactively." Id. Thus, the court concluded:

> The "availability" language in the fiscal year 1996 appropriation either plainly limits the funds available for contract support to the $7.5 million appropriated for that purpose or, if we were to take the interpretation most favorable to the Tribes, is at best ambiguous, leaving room for an argument that the remaining $1.7 billion is also "available." But the ambiguity, if there is any, is cleared away, both by the Appropriations Committee report explaining the $7.5 million appropriation when it was made

> and, with no possible ambiguity, by the 1999 "that's all there is" language in § 314.

Id. at 667.

Plaintiffs respond that the term "shall remain available" has a particular meaning in appropriations law: "the language in the ISD provision is about *when* a stated sum of money may be spent *after* the current fiscal year on CSCs for 'initial or expanded' contracts, not how much may be spent in the *current* year for that purpose." Appellants' Op. Br. at 35. But the two decisions of the Comptroller General plaintiffs cite in support of that interpretation do not, in our view, support it.[10] We agree

---

[10] In Matter of Forest Service-Appropriations for Fighting Forest Fires, B-231,711, 1989 WL 240615 at *2 (Comp. Gen.1989), the Comptroller General observed that "the language 'of which $263,323,000 for . . . firefighting ... shall remain available' . . . does not represent a line-item limitation or a cap on the amount of money available for obligation for firefighting. Rather, this language expresses the availability *of a specific amount* as to time two years instead of one." (emphasis added) (footnote omitted). In Matter of: The Honorable Thad Cochran, B-271,607, 1996 WL 290140 at *1 (Comp. Gen.1996), the Comptroller General stated that "[w]hen the Congress expressly provides that an appropriation 'shall remain available until expended,' it constitutes a no-year appropriation and all statutory limits on when *the funds* may be obligated and expended are removed." (emphasis added). Both of those decisions clearly discuss the temporal limitation the phrase "shall remain available" places on expenditures, but they do not clearly support plaintiffs' argument that the *amount* of funds specified is subject to unlimited expansion.

Furthermore, our view is supported by the Office of General Counsel of the United States General Accounting Office: "The 'shall be available' family of earmarking language presumptively 'fences in' the earmarked sum (both maximum and minimum), but is more subject to variation based upon underlying congressional intent." 2 United States General Accounting Office, Principles of Federal Appropriations Law, at 6-8 (2d ed.1992). There is no evidence of an underlying Congressional intent rebutting the presumption that the "shall be available" language

(continued...)

with the Ninth Circuit that a better reading of the language is that Congress intended to limit the amount available for new or expanded CSCs to $7.5 million.

III. Section 314

As indicated, in October 1998, Congress passed an Emergency Supplemental Appropriations Act, which included § 314. That section stated in part that "amounts appropriated to or earmarked in committee reports for . . . the [IHS] by Public Laws . . . 104-134[and] 104-208 . . . for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, . . . compacts, or annual funding agreements with . . . the [IHS] as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes. . . ." Pub. L. No. 105-277, § 314, 112 Stat. 2681-288 (1988). Public Laws 104-134 and 104-208 were, respectively, the Appropriations Acts for fiscal years 1996 and 1997.

The government argues we need not consider § 314 as a retroactive law; rather, it simply clarifies what Congress meant in enacting the 1996 and 1997 Appropriations Acts. The Tribes argue that, if we construe § 314 retroactively, it amounts to a breach of statutory and contractual vested rights.

"[I]t is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect." INS v. St. Cyr, 533 U.S. 289, 316 (2001). There must, however, be "a clear indication from Congress that it intended such a result." Id.; see also Daniels v. United States, 254 F.3d

---

[10](...continued)
fenced in the earmarked amount of $7.5 million. Indeed, to the extent there is any indicia of Congressional intent, either in the appropriations committee report or in the later-enacted § 314, it supports the conclusion that Congress intended the $7.5 million to be a maximum.

1180, 1187 (10th Cir. 2001) ("Congress . . . has the power to . . . direct [a] statute's retroactive application, but it must do so explicitly.").

Whether we view this as a retroactive law, or as merely a clarification of the prior Appropriations Acts, Congress could not have been clearer as to its intent that the Act have a retroactive effect. It specifically references prior laws enacted in prior years, both by number and by date, and specifically states that "the amounts appropriated to or earmarked in committee reports . . . are the total amounts available." Thus, Congress indisputably indicated no more funds would be available to pay CSCs for those years, and it made it very clear that that is what it intended to appropriate for those years. We therefore agree with the district court that § 314 supports its conclusion that Congress intended to make available for CSCs for new or expanded contracts in fiscal years 1996 and 1997 *only* $7.5 million. Further, it indicated that the earmarked amounts in the committee reports for ongoing CSCs were intended to be legally binding. And, as we explain infra, because any contract claim was conditioned on, and subject to, available appropriations, we reject plaintiffs' argument that § 314 breached plaintiffs' contractual and /or statutory rights.

IV. Contract Claims

Finally, the Tribes argue that, under the doctrine of New York Airways, Inc. v. United States, 369 F.2d 743 (Ct.Cl. 1966), "an ISDA contract binds the United States to pay even where the agency fails to seek sufficient appropriations from Congress." Appellants' Op. Br. at 2. In New York Airways, the plaintiff helicopter company sued the government for money allegedly not paid for mail delivery. The company was entitled by statute to receive compensation for its services, but the amounts earmarked in the appropriations act were exhausted before the end of the fiscal year. The Court of Claims held the

government was obligated to pay the helicopter service: "the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Governmental obligation created by statute." New York Airways, 369 F.2d at 748 (citing United States v. Vulte, 233 U.S. 509 (1914)). By contrast, however, where a "contract expressly provided that the quantities of work ordered shall be kept 'within the limits of available funds,'" and where the relevant statute "prohibited obligating the Government to pay a larger sum . . . than covered by a specific appropriation" then work "performed in excess of the appropriation was held not to create an obligation against the Government enforceable in the courts." Id.

This case is like the latter situation, in that the government's contractual and statutory obligation to pay CSCs was expressly subject to the availability of appropriations. The doctrine of New York Airways does not therefore support the Tribes' assertion that the government is liable under contract principles despite any shortfall in appropriations. See Oglala Sioux, 194 F.3d at 1379 (rejecting the identical argument based on New York Airways, stating "Oglala's situation differs fundamentally in that the ability of Interior to bind the Government contractually was expressly conditioned on the availability of appropriations.").[11]

---

[11]The Tribes also argue that, under United States v. Winstar Corp., 518 U.S. 839 (1996), the government may not "repudiate its own debts . . . simply in order to save money" and that "when it attempts to do so it is no more than a party breaching a contract." Appellants' Op. Br. at 46. Thus, they suggest that, whether or not appropriations were available, the government remained contractually bound. We disagree. It was always clear and explicit, both in the ISDA and in the contracts with the government, that the funding was subject to available appropriations and, despite the Tribes' repeated (continued...)

CONCLUSION

We have carefully considered all of the Tribes' arguments. For the foregoing reasons, we AFFIRM the judgment of the district court.

---

[11](...continued)
assertions to the contrary, there were, in fact, insufficient appropriations to permit full funding.

APPENDIX B

[Filed June 25, 2001]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 99CV92

CHEROKEE NATION OF OKLAHOMA; SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

UNITED STATES OF AMERICA, DONNA E. SHALALA, Secretary of the United States Department of Health and Human Services, and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,

Defendants.

ORDER

Before the court for its consideration is the plaintiffs Cherokee Nation and the Shoshone-Paiute Tribes' motion for partial summary judgment of liability on the first and second causes of action and the plaintiffs' motion for declaratory judgment on the third cause of action. Also at issue is the defendants' cross motion for summary judgment.

I. Facts

The court finds the facts as follows. The Indian Self-Determination and Education Assistance Act of 1975, 25

U.S.C. § 450 *et. seq.* (hereinafter the "ISDA") was designed to promote tribal autonomy and self-governance. In the ISDA, Congress allowed tribes to assume direct operation of federal programs administered to tribes that formerly had been controlled by the Indian Health Services (hereinafter "IHS"). The ISDA directs the Secretary of the Interior:

> . . . upon the request of any Indian tribe . . ., to enter into a self-determination contract . . . . with a tribal organization to plan, conduct, and administer programs or portions thereof . . . . [that are provided] for the benefit of Indians because of their status as Indians. 25 U.S.C. § 450f(a)(1).

If the tribe elects to assume operation of programs, the tribe enters into a Self-Determination Contract or a Self-Governance Compact.[1] If a tribe enters into one of these agreements with the government, the only role of the IHS is to monitor the operations of the tribes. The ISDA was designed to assure that funding for services provided to tribes would not be decreased solely because a tribe had assumed operation of the program in question. The ISDA requires that funding under the contract "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs . . ." (25 U.S.C. § 450j-1(a)(1)). This amount, known as the "secretarial amount", is the "amount of funding that would have been appropriated for the federal government to operate the programs if they had not been turned over to the Tribe." Ramah Navajo School Board, Inc. v. Babbitt, 87 F.3d 1338, 1341 (D.C.Cir.1996).

In addition to the secretarial amount, the tribes are also paid contract support costs. However, in the beginning these

---

[1]In the case at bar, both plaintiffs are parties to a compact. Since Self-Governance Compacts and Self-Determination Contracts are both subject to the same Congressional appropriations mechanism, the terms will be used interchangeably. 25 U.S.C. § 450j-1(b).

payments were inadequate to meet the needs of the tribal contractors. In 1988, Congress responded by amending the ISDA to make payment of contract support costs mandatory. (Senate Report 103-374, dated September 26, 1994, presented by Senator Inouye from the Committee on Indian Affairs, attached to Plaintiffs' Motions for Summary Judgment as Exhibit "3" and Report to Congressional Committees, entitled "Shortfalls in Indian Contract Support Costs Need to be Addressed," dated June 1999 and prepared by the Governmental Accounting Office, attached to Plaintiffs' Motions for Summary Judgment as Exhibit "2"). The ISDA specifically enumerates which items can be characterized as contract support costs. The ISDA states contract support costs include all "reasonable costs for activities which must be carried on by a tribal organization as a contractor compliance with the terms of the contract and prudent management," and which are not already included in the secretarial amount specified in 25 U.S.C. § 450j-1(a)(2). (25 U.S.C. § 450j-1(a)(2)). Contract support costs fall into two categories: direct and indirect. The ISDA defines the term indirect contract support cost as those "costs incurred for a common or joint purpose benefiting more than one contract objective or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;" 25 U.S.C. § 450b(f). Direct contract support costs are all those allowable costs that strictly benefit the IHS programs only and that are not otherwise included in either the indirect costs or in the secretarial amount. 25 U.S.C. § 450b(f). On an annual basis, the IHS calculates the "full" contract support cost needs of each tribal contractor using a variety of information. (Department of Health and Human Services Indian Self- Determination Memorandum No. 92-2 entitled "Contract Support Cost Policy" at 5- 9 attached to Plaintiffs' Motions for Summary Judgment as Exhibit "4"). The IHS issues a shortfall report which reflects the deficiency in contract

support costs. In this shortfall report, the IHS summarizes each tribes "full" contract support cost needs from the prior year, how much IHS paid against the need, and the resulting shortfall, if any. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E").

IHS finances Self-Determination Contracts and Compacts under the ISDA, as well as all of its direct health service programs, through funds derived from an annual lump-sum appropriation from Congress designated for "Indian Health Services." IHS' total appropriations from Congress in fiscal years 1996 and 1997 was $1,747,842,000 and $1,806,269,000 respectively. (Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-212 (1997) attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "C", Omnibus Consolidated Appropriations Act, 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996) attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "B" and Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E"). Most of IHS' annual appropriations are distributed to area offices for the payment of recurring costs. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E"). Recurring costs occur automatically from year to year and must be funded without reduction. In fiscal years 1996 and 1997 respectively, IHS allocated $1,313,990,083 and $1,368,893,059 in recurring costs to area offices. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E").

The remainder of the total annual lump-sum appropriated to IHS is retained each year by headquarters for activities that it manages. All of the money reserved for fiscal years 1996 and 1997 was spent, leaving a zero balance at the end of those fiscal years. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E").

For fiscal years 1996 and 1997, Congress earmarked in appropriation committee reports, $153,040,000 in 1996 and $160,660,000 in 1997, to be spent on existing contract support costs. These contract support funds were allocated to the area offices for tribal Contracts and Compacts for fiscal years 1996 and 1997. Any diversion of funds for additional contract support costs would have required the IHS to use money otherwise dedicated for other purposes. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E"). To fully pay the contract support costs as requested by plaintiffs would cause a reduction in funding which could severely cripple or even eradicate many health programs serving other tribes or individual Indians. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E").

The defendants allege that they failed to pay the plaintiffs the full amount of contract support costs they were requesting because plaintiffs were not the proper recipients based on the queue list system. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E"). The funds allocated to the IHS for the execution of self-determination contracts were consistently insufficient to meet the obligation. The queue list system was developed to address the shortfall IHS was encountering with payment of

contract support costs. IHS determined that it would place all requests on a queue list or priority list, based on the date of receipt of the request. Approved requests for contract support costs would be 100% funded on a first-come, first-serve basis. Once these funds were exhausted, tribes awaiting new contract support cost funding would be provided new funds in the order they made their request when additional appropriations were available. In the year a tribe reached the top of the queue, it would be paid its new contract support costs for that year and would continue to be paid at least that amount of contract support costs for the newly funded program every year thereafter. This procedure has been used since 1992 for self-determination contracts and was subsequently applied to self-governance compacts. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E").

In 1998, Congress passed the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681, 2681- 288 (1998). This section imposes a cap on IHS payments each year to tribes for contract support costs for new and expanded programs from 1994 through 1998. Congress earmarked $7.5 million to be taken from the lump-sum appropriation for contract support costs for each year from 1994 through 1997, to pay tribes for new contract support costs resulting from new or expanded programs. (Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-2084, 110 Stat. 3009 at 3009-213 (1997) and Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 at 1321-189 (1996)). In 1996 and 1997, the IHS had already spent its $7.5 million allotment on tribes which were ahead of the Shoshone-Paiute Tribes on the queue list. In 1997, the Cherokee Nation did not receive any additional funding for contract support costs

because IHS had already spent its $7.5 million allotment on tribes which were ahead of the Cherokee Nation on the queue list. (Declaration of Carl L. Fitzpatrick attached to Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment as Exhibit "E").

Shoshone-Paiute tribes are federally recognized Indian tribes with an enrolled population of approximately 1,800 members, most of whom live on or near the Duck Valley Reservation, in the desert of northern Nevada and southern Idaho. The health facilities of the tribes are located in Owyhee, Nevada. In 1976, IHS built a 15 bed Owyhee Community Health Facility which is still in use. (Affidavit of Winona Manning attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "16").

In 1988, IHS announced plans to terminate inpatient care at the Owyhee Community Health Facility. In October 1994, the tribes entered into a Self- Governance Compact with IHS, with a plan to contract for the operation of the community health facility. (Affidavit of Winona Manning attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "16").

Next, the Shoshone-Paiute tribes expanded an existing Self-Determination Contract with IHS by contracting to operate the balance of the IHS community health programs. On January 1, 1995, they shifted these programs over to an Annual Funding Agreement, under their compact, for the remainder of fiscal year 1995. (Affidavit of Winona Manning attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "16").

In fiscal year 1996, the Shoshone-Paiute tribes amended the compact expanding the IHS programs they administered to include community health programs plus all of the available IHS Owyhee Hospital Services. Since fiscal year 1996, they have continued to deliver these services. (Affidavit of Winona Manning attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "16").

In their Compact of Self-Governance dated October 1, 1994, Article II, Section 3 provides: "Funding Amount. Subject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to § 106(b) of the Indian Self-Determination and Education Assistance Act, as amended, the Secretary shall provide the total amounts specified in the Annual Funding Agreement." (Compact of Self-Governance between the Duck Valley Shoshone-Paiute Tribes and the United States of America, attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "19" at 10). Further, in the Annual Funding Agreement entered into between the Shoshone-Paiute tribes and the government, Section 9-Adjustments provides:

> (a) Due to Congressional Actions. The parties to this Agreement recognize the total amount of the funding in this Agreement is subject to adjustment due to Congressional action in appropriations Acts or other laws affecting availability of funds to the Indian Health Service and the Department of Health and Human Services. Upon enactment of any such Act or law, the amount of funding provided to the Tribes in this Agreement shall be adjusted as necessary, after the Tribes have been notified of such pending action and subject to any rights which the Tribes may have under this Agreement, the Compact or the law.

(Annual Funding Agreement between the Duck Valley Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America, dated October 1, 1995, attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "23" at 13).

For the year 1996, the Secretary agreed in the Shoshone-Paiute tribes' Amended 1996 Annual Funding Agreement that the "amounts that are available to the Tribes pursuant to the Compact and Title III" include "approved and agreed recurring direct ($494,517) and non-recurring indirect

($1,173,149) contract support funds . . . associated with both those programs", and $367,400 in "approved and agreed . . . . non-recurring direct start-up or preaward contract support costs in connection with the [same programs]". (Amendment Number 1 to the Fiscal Year 1996 Annual Funding Agreement for the Shoshone-Paiute Tribes of the Duck Valley Reservation, amended March 6, 1996, dated May 22, 1996 attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "26" at 1).

In fiscal year 1997, the Shoshone-Paiute tribes and IHS agreed simply that "the sum of $1,847,196 in recurring direct and indirect contract support cost funds associated with those programs," and $435,762 in nonrecurring funding, of this specified amount $367,400 represents "one-time start-up or preaward contract support funds". This same document provides in Section 9: "(a) Due to Congressional Actions. The parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to the availability of appropriations." (Annual Funding Agreement, dated October 1, 1996 attached to Plaintiffs' Motions for Summary Judgment as Exhibit "27" at 8-9, 14). Plaintiffs allege defendants failed to fully pay the contract support costs for the years 1996-1997.

The Cherokee Nation is a federally recognized tribe with an enrollment in excess of 200,000 members. Approximately 91,000 members live within the Cherokee Tribal Jurisdictional Service Area which is a 7,000 square mile region in the northeast corner of Oklahoma. Tribal services are provided throughout the Tribal Jurisdictional Area. The Cherokee Nation has operated various IHS care programs under the authority of the Indian Self-Determination Act for the benefit of its members and other eligible Indians. In fiscal year 1994, the Cherokee Nation began operating these and other IHS programs pursuant to a Self-Governance Compact and associated Annual

Funding Agreements. Under the terms of its compact and its fiscal year 1997 Annual Funding Agreement the Cherokee Nation operated five rural outpatient clinics, providing basic outpatient medical care, dental programs, optometry, radiology, mammography, behavioral health services, medical laboratory services, pharmacy services, community nutrition programs, and a public health nursing program. The Cherokee Nation also operated associated programs associated with the IHS Claremore Hospital. (Affidavit of Bill Thorne attached to Plaintiffs' Motions for Summary Judgment as Exhibit "36", Compact of Self-Governance between The United States of America and the Cherokee Nation, at 4, dated June 1993, attached to Plaintiffs' Motions for Summary Judgment as Exhibit "37", Annual Funding Agreement between the Cherokee Nation and the United States of America, dated July 1996, attached to Plaintiffs' Motions for Summary Judgment as Exhibit "39" and Addendum No. 1 to FY 1997 Annual Funding Agreement between the United States of America and the Cherokee Nation, dated 1997, attached to Plaintiffs' Motions for Summary Judgment as Exhibit "40").

In its Self-Governance Compact entered into in 1993, Article IV, Section 3 provides:

> "Funding Amount. Subject only to the appropriation of funds by the Congress of the United States, and to adjustments pursuant to section 106(b) Title III of P.L. 93-638, as amended the Secretary shall provide to the Nation the total amount of funds specified in the Annual Funding Agreement incorporated by reference in Article V, Section 1. In accordance with Section 304 Title III of P.L. 93-638, as amended the use of any and all funds under this Compact shall be subject to specific directives or limitations as may be included in applicable appropriations acts."

(Compact of Self-Governance between The United States of America and the Cherokee Nation, at 4, dated June 1993,

attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "37" at 4).

In the Annual Funding Agreement which was incorporated into the Self- Governance Compact Section 10 provides in pertinent part:

> The parties agree that adjustments may be appropriate due to unanticipated Congressional action. Upon enactment of relevant Appropriations Acts, the adjustments may be negotiated as necessary; provided, however, the Nation shall be notified and consulted in advance of any proposed adjustments. It is recognized by the parties that circumstances may arise where funding variances or other changes or modifications may be needed and the parties shall negotiate same in good faith. Provided, however, this AFA shall not be modified to decrease or delay any funding except pursuant to mutual agreement of the parties.

(Annual Funding Agreement between the Cherokee Nation and the United States of America at 5, dated July 1996, attached to the Plaintiffs' Motions for Summary Judgment as Exhibit "39" at 5).

In fiscal year 1997, the Cherokee Nation calculated that it was entitled to be paid $4,442,099 in indirect costs associated with carrying out all of its contracted IHS programs. (Affidavit of Bill Thorne attached to Plaintiffs' Motions for Summary Judgment as Exhibit "36"). IHS paid $1,656,151, to the Nation. Further, the IHS never paid the Cherokee Nation any direct contract support costs for several newer programs, although the Nation requested and the local Oklahoma area office approved specific amounts of direct contract support costs for each of these programs. (Affidavit of Bill Thorne attached to Plaintiffs' Motions for Summary Judgment as Exhibit "36").

On March 5, 1999, the Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes filed a lawsuit in this court alleging the defendants committed a breach of contract and violated the provisions of the ISDA by failing to pay the proper amount to the tribes for contract support costs. On May 17, 1999, the plaintiffs filed their first amended complaint re-alleging the prior two causes of action and alleging an additional cause of action which states that Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for fiscal year 1999, Pub. L. 105-277, does not retroactively extinguish or otherwise bar the claims asserted in their complaint.

Plaintiffs filed motions for summary judgment on their three causes of action and the defendants filed a cross motion for summary judgment on all three causes of action asserted by plaintiffs. Currently pending before the court are the Plaintiffs' Motion for Partial Summary Judgment of Liability on the First and Second Causes of Action, the Plaintiffs' Motion for Declaratory Judgment on the Third Cause of Action and the Defendants' Cross Motion for Summary Judgment. On April 5, 2000, after filing the motions for summary judgment, plaintiffs moved to have the court certify a class. On February 9, 2001, the court denied that motion.

II. Standard of Review

25 U.S.C. § 450m-1(a) of the ISDA authorizes district courts to exercise jurisdiction over civil actions brought under the ISDA and to order appropriate relief. However, it fails to provide any standard of review. The parties have been unable to agree on the appropriate standard of review for this court. Plaintiffs argue the appropriate standard of review is *de novo*. They argue that under the ISDA, the Contract Disputes Act, 41 U.S.C. § 601 *et. seq.*, applies to civil actions arising under Self-Determination Contracts and Self-Governance Compacts pursuant to 25 U.S.C. § 450m-1(d) and ISDA Title III, §

303(d), reprinted at 25 U.S.C. § 450f (note). Thus, plaintiffs argue the Contract Disputes Act applies to their claims. Plaintiffs argue the Contract Disputes Act provides that a contractor's appeal from the decision of a contracting officer "shall proceed *de novo*." 41 U.S.C. § 609(a)(3).

Plaintiffs also argue that even if the Contract Disputes Act were not applicable to their lawsuit, the standard of review for this case would still be *de novo* under the ISDA. Plaintiffs argue that Congress intended a *de novo* review when it used the terms "original jurisdiction", "civil action", and "other appropriate relief" including money damages in the ISDA. Plaintiffs also argue the legislative history and canons of statutory construction support this court exercising a *de novo* review over an action brought pursuant to the ISDA.

Defendants argue that since the ISDA does not set forth the standard of review, the Administrative Procedures Act (hereinafter the "APA") will provide the appropriate standard. Under the APA, the court must uphold an agency decision unless plaintiffs can show the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." In support of their argument, defendants present to the court three unreported cases, Suquamish Tribe v. Ada Deer, C-96-5468 (RJB) (W.D.Wash., September 2, 1997), California Rural Indian Health Board, Inc., v. Donna Shalala, C-96- 3526 (DLJ) (N.D. Cal. April 24, 1997) and Yukon-Kuskokwim Health Corporation v. Shalala, A-96-155 (JWS) (D . Alaska April 15, 1997). These cases have also considered the appropriate standard of review under the ISDA and have held the APA standard of review controls. Addressing the same arguments which have been advanced here, those courts held the ISDA is ambiguous and resolved the ambiguity by applying the presumption against *de novo* review.

The ISDA states: "The Contract Disputes Act . . . shall apply to self-determination contracts . . ." 25 U.S.C. § 450m-1(d).

The Contract Disputes Act states that a claim brought pursuant to the act should "proceed *de novo*." 41 U.S.C. § 609(3). In their first amended complaint, the plaintiffs allege a cause of action pursuant to the Contract Disputes Act. (See First Amended Complaint May 17, 1999 at paragraph 2, 17 and 34). Defendants argue that even if plaintiffs intended to allege a cause of action under the Contract Disputes Act, they failed to do so.

Defendants contend the Contract Disputes Act only applies to claims for money damages. Defendants argue plaintiffs are not actually seeking money damages resulting from a breach of their contracts, but rather are requesting additional contract support funding to which they are allegedly entitled under their contracts and the ISDA. Defendants contend money damages are given to compensate for a suffered loss. In the case at bar, plaintiffs are seeking a specific remedy. A specific remedy is not a substitute for injuries but is an attempt to give the plaintiffs the very thing to which they are entitled. Defendants argue this case really concerns a question of whether defendants have properly interpreted the ISDA rather than a dispute over how much they owe in alleged damages. While it is not entirely clear what specific money damages plaintiffs are seeking in this action, this court finds this lawsuit centers around how much the defendants possibly owe in alleged damages to plaintiffs for failure to fulfill the terms of their contracts.[2] Thus, it appears to this court their request can

---

[2]The defendants also argue that even if plaintiffs' claims were characterized as one for money damages, the *de novo* standard still would not apply because that standard only applies to suits brought in the Court of Claims. However, 25 U.S.C. § 450m-1(a) provides that the United States district courts and the Court of Claims have concurrent jurisdiction. Thus, absent statutory authority to the contrary, the court would be required to apply a *de novo* standard of review to any claim brought pursuant to the Contract Disputes Act.

properly be termed as one for money damages. Bowen v. Massachusetts 487 U.S. 879, 895, 900-901 (1988). As a result, this lawsuit is properly brought under the Contract Disputes Act and the *de novo* standard applies.

Even if the court had found the plaintiffs' case was not properly brought under the Contract Disputes Act, the court would have found the standard of review for an action brought pursuant to the ISDA to be *de novo*.[3] In interpreting a statute, the function of the court is simple. It is to "construe the language so as to give effect to the intent of Congress." United States v. American Trucking Associations, 60 S.Ct. 1059, 1063 (1940). "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." Id.

25 U.S.C. § 450m-1(a) provides:

> The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this

[3]The court considered the three unreported cases cited by defendants in support of their argument that the APA standard of review applies. However, the court found the reasoning and analysis in Shoshone-Bannock Tribes of Fort Hall v. Shalala, 988 F. Supp. 1306 (D. Or. 1997), more persuasive. Accordingly, this court holds that the appropriate standard of review is *de novo*.

> subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

It is well-settled law that when a statute provides for judicial review but fails to set-forth the standards for that review, the court looks to the APA for guidance. United States v. Carlo Bianchi & Company, 373 U.S. 709, 715 (1963). The APA standard of review requires a court to determine if the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). It also limits review to the administrative record. 5 U.S.C. § 706. However, it has been noted that when Congress intends review to be confined to the administrative record, it so indicates, either expressly or by use of a term like "substantial evidence". Chandler v. Roudebush, 425 U.S. 840, 862, n. 37 (1976). It is clear from the plain language of the statute there is no such language indicating that review under the ISDA is limited to the restrictive APA standard. In fact, this court finds the plain language of the statute, along with its legislative history, indicates a *de novo* review of an action brought pursuant to the ISDA was intended by Congress.

Section 450m-1(a) of the ISDA grants district courts "original jurisdiction" over "civil actions" with authorization to award money damages. This court finds the use of these terms taken in combination denote an intention by Congress to grant the right of *de novo* review. As the District Court of Oregon stated, "The phrase 'original jurisdiction' has been distinguished from appellate jurisdiction both by Black's Law Dictionary 991 (5th ed.1990) and by Article III, Section 2, Clause 2 of the United

States Constitution." Shoshone-Bannock Tribes of Fort Hall v. Shalala, 988 F. Supp. 1306, 1314 (D. Or. 1997). It is possible that Congress intended to provide for a *de novo* review when it determined to use the term 'original jurisdiction.' However, very little can be determined by Congress' choice to use the term "original jurisdiction" standing alone. As the court stated in Shoshone- Bannock, "..a court with 'original jurisdiction' may exercise essentially appellate powers, as with district court review under the APA, while courts with appellate jurisdiction may conduct *de novo* review as with appellate review of district court's conclusions of law." Id.

This court agrees with the District Court of Oregon that the use of the phrase "civil action" in combination with "original jurisdiction" and the power to award money damages in the ISDA supports a *de novo* review. Shoshone- Bannock of Fort Hall, 988 F. Supp. at 1315. Congress has previously used the terms "original jurisdiction" or "civil action" when vesting jurisdictionin the district courts in matters that proceed *de novo*. See 28 U.S.C. §§ 1331, 1332, 1335, 1337, 1338, 1339, 1340 and 1343. Shoshone-Bannock of Fort Hall, 988 F. Supp. at 1314. In Chandler, the United States Supreme Court was interpreting the statutory language of Title VII, which allows a federal employee to bring a "civil action" following an agency decision. In evaluating the language of the statute, the United States Supreme Court held that under Title VII federal employees are entitled to the same rights as private-sector employees, namely discovery and *de novo* review of an agency decision. Chandler, 425 U.S. at 845.

This court also finds it instructive that the ISDA allows for money damages whereas the APA does not. 5 U.S.C. § 702. This court believes this again expresses Congress' intention for actions brought under the ISDA to be submitted to a *de novo* review.

The legislative history of the ISDA also indicates that Congress intended a *de novo* review. In the early days of the ISDA the Secretary of the United States Department of Health and Human Services was originally delegated broad general authority to "perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out" the ISDA. 25 U.S.C. § 450k(a).[4] The ISDA took the extraordinary step of requiring the IHS, operated by the Secretary of the Department of Health and Human Services, to turn over the direct operation of its federal programs to any Indian tribe which elects to run those programs for its people. 25 U.S.C. § 450f(a)(1). The ISDA requires the defendants to divest themselves of the authority as well as the associated funding to operate their programs. However, the Secretary was apparently reluctant to follow the mandate issued by Congress and the tribes never received the appropriate amount of funding. In 1988 and 1994, viewing their delegation of this broad authority to the IHS as a mistake, Congress enacted sweeping amendments to restrict the authority of the Secretary. These amendments were designed to limit the Secretary's discretion as much as possible. (See Senate Report 103-374, dated September 26, 1994 presented by Senator Inouye from the Committee on Indian Affairs attached to Plaintiffs' Motions for Summary Judgment as Exhibit "2" and 25 U.S.C. § 450k which restricts IHS' discretion over the contracting process.)

Under the ISDA, a tribe has two alternative appeal routes when the Secretary declines a Self-Determination Contract. The tribes have the right to "a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised." 25 U.S.C. § 450f(b)(3). The appeal may be within the

---

[4]This language was subsequently stricken in the 1994 amendments.

agency or to an administrative law judge. 25 U.S.C. § 450f(e)(2). If the tribe chooses not to take that route, it can file an action in district court. 25 U.S.C. § 450f(b)(3). Obviously, Congress intended to give the tribes the option to bypass the agency review process.

In construing a statute, a court must look "to the provisions of the whole law, and its object and policy." United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439, 455 (1993). This court finds the policy and objectives to be achieved through the ISDA and any alleged violations by the agency are best redressed by the right to *de novo* review. Shoshone-Bannock of Fort Hall, 988 F. Supp. at 1316. The court agrees with the court in Shoshone-Bannock Tribes of Fort Hall when it stated:

> To deny a tribe the same rights with respect to a claim filed in a federal district court than it is entitled to obtain through the administrative process would be a perverse result. A tribe should be entitled to the same full discovery, hearing and *de novo* review when it elects to proceed directly to court as it is entitled to receive if it elects to proceed before the agency or an ALJ.

Shoshone-Bannock of Fort Hall, 988 F.Supp. at 1317.

This court agrees that given the history of the ISDA, including Congress' repeated attempts to limit the Secretary's discretion and the provision for a full review at the agency level, that Congress intended more than a cursory review of the administrative record. This court holds that Congress intended *de novo* review of claims brought under the ISDA.[5]

---

[5]In arriving at this conclusion, the court was mindful of the direction the Tenth Circuit Court of Appeals gave to courts interpreting the ISDA. In interpreting 25 U.S.C. § 450j-1, the Tenth Circuit Court of Appeals stated "the canon of [statutory] construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes." Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir.1997). The Tenth Circuit Court of Appeals stated "if the [Act] can reasonably be construed as the Tribes would have it construed, it must be construed that way." Id. at 1462, quoting Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1445 (D.C.Cir. 1988).

III. PLAINTIFFS ARE NOT ENTITLED TO ADDITIONAL CONTRACT SUPPORT COSTS

The plaintiffs argue they are entitled to their full contract support costs under their respective contracts because the terms in these documents are legally binding. Plaintiffs also argue the ISDA entitles them to full payment of their contract support costs.[6] Defendants respond that plaintiffs ignore the fact that their Self-Determination Contracts specifically state that those contracts are subject to the "availability of appropriations" even in the absence of the statutory funding cap established by the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681, 2681-288 (1998) (hereinafter "Section 314"). Defendants state that no appropriations were in fact available to satisfy the claims made by plaintiffs for the years 1996 and 1997. Defendants further contend Section 314 definitively prescribes that no further appropriations were available to pay the contract support costs requested by plaintiffs for fiscal years 1996 and 1997 for their new and expanded programs undertaken in those years. Defendants finally argue the IHS could only pay such costs to plaintiffs by deducting funding from programs that serve other tribes. This diversion of funds would be in violation of the responsibility the IHS has to other tribes and in violation of the express provisions of the ISDA.

---

[6]The parties agree that since the court failed to certify a class in the case at bar, the only years at issue for payment of contract support costs are 1996 and 1997.

Both of the contracts at issue contain the following language "Subject only to the appropriations of funds by the Congress of the United States and the adjustments pursuant to § 106(b)." In fact, this language is utilized in all contracts and compacts entered into under the ISDA. Further, the statute itself specifically states the obligations are dependent on funding. 25 U.S.C. § 450j-1(b) provides:

> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

This court finds the contracts at issue are conditioned on the IHS having sufficient funding. This court does not agree with the interpretation espoused by plaintiffs that the language in the Self-Determination Contracts which states that contract support costs are "subject to availability of appropriations" limits only the Secretary's ministerial duty to disburse funds but not her ultimate liability for full contract support costs. It has been held that "The language of [25 U.S.C.] § 450j-1(b) is clear and unambiguous; any funds provided under an ISDA contract are 'subject to the availability of appropriations.' . . . Other sections of the ISDA indicate congressional intent to make ISDA funding subject to the availability of appropriations." Babbitt v. Oglala Sioux Tribal Public Safety Department, 194 F.3d 1374, 1378 (C.A. Fed. 1999). To adopt plaintiffs' interpretation would render the phrase "availability of appropriations" meaningless. "The best evidence of [congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous . . . we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment

process." West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 98-99 (1991). "When the words of a statute are unambiguous, then, 'judicial inquiry is complete'". Connecticut National Bank v. Germain, 503 U.S. 249, 254 (1992). In Oglala, that court simply concluded the ISDA is clear "if the money is not available, it need not be provided." Oglala, 194 F.3d at 1379. This court agrees the statute is unequivocal, if the money is not available, IHS does not have to provide it.

Plaintiffs acknowledge their Self-Determination Contracts do include language that they are subject to "available appropriations". However, plaintiffs argue there were appropriations legally available to pay the contract support costs for the years in question. The court finds this contention without merit. Plaintiffs contend that in 1996 $1.374 billion and in 1997 $1.426 billion was appropriated as a lump-sum to IHS to implement the ISDA and other specified laws. Plaintiffs argue there is nothing in the appropriation acts which limits the use of these funds. Plaintiffs claim that if appropriated funds were legally available to pay the contract support request, the Secretary had no discretion to refuse payment. In support of this argument, the plaintiffs cite Alamo Navajo School Board, Inc., and Miccosukee Corporation, IBCA Nos. 3560-3562, 3463-3466, 1997 WL 759441 (Dec. 4, 1997), rev'd, Babbitt v. Miccosukee Corporation, 217 F.3d 857 (Fed.Cir. 1999), *cert. denied,* 530 U.S. 1203 (2000). In Alamo, the court held the availability of appropriations language does not apply where the appropriation is in the form of an unrestricted lump-sum amount that is sufficient to cover mandatory funding and "where the Department's current appropriations Act lacks any statutory earmark affecting the use of funds for such purposes." Id. at 20-21. Plaintiffs also cite Shoshone-Bannock Tribes of Fort Hall for the proposition that contract support costs must be

paid if the agency has received sufficient appropriations to do so.

IHS' total appropriations from Congress for "Indian Health Services" in fiscal years 1996 and 1997 was $1,747,842,000 and $1,806,269,000 respectively. Most of IHS' annual appropriations are distributed to area offices for the payment of recurring costs. Recurring costs occur automatically from year to year and must be funded without reduction. In fiscal years 1996 and 1997, respectively, IHS allocated $1,313,990,083 and $1,368,893,059 in recurring costs to area offices. The remainder of the total annual lump-sum appropriated to IHS is retained each year by headquarters for activities that it manages. All of the money reserved for fiscal years 1996 and 1997 was spent leaving a zero balance at the end of those fiscal years. For fiscal years 1996 and 1997, Congress earmarked in appropriation committee reports, $153,040,000 in 1996 and $160,660,000 in 1997 to be spent on existing contract support costs. These contract support funds were allocated to the area offices for tribal contracts and compacts for fiscal years 1996 and 1997. The court finds the money appropriated to IHS for fiscal years 1996 and 1997 was already committed to pay for funding of recurring costs and other mandatory obligations. Thus, there were simply insufficient appropriations to pay the contract support costs requested by plaintiffs. Further, the IHS could not use any of its annual appropriations to pay plaintiffs' contract support costs without impairing its ability to discharge its responsibilities with respect to other tribes and individual Indians. Such a reduction could severely impair various Indian programs. 25 U.S.C. § 450f, § 306 and 450j-1(b) prohibits the IHS from reducing funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization to fund their self-determination contracts.

Plaintiffs also argue that even if no appropriations were available the government is nonetheless liable to them for

contract support costs under the ISDA. In support of the proposition that the ISDA affirmatively requires the government to enter into contracts for a specified amount of contract support costs and to be held liable for that amount regardless of the appropriations, plaintiffs cite New York Airways, Inc. v. United States, 369 F.2d 743 (Cl. Ct. 1966). This court agrees with the court in Oglala that the New York Airways case is inapplicable to the case at bar. Oglala, 194 F.3d at 1379. In New York Airways, the government, as a contracting party, had an unqualified contractual obligation for which it had simply failed to appropriate money and pay. In the instant case, the agency's ability to bind the government contractually was expressly conditioned by statute and contract on the availability of appropriations. Further, the statute at issue in New York Airways provided the government should "make payments out of appropriations," unlike the statute in this case which provides the government payments are "subject to the availability of appropriations." Thus, the court finds the holding in New York Airways is not dispositive of the issues before this court. This court finds the situation in the instant case distinctly different from the cases cited by plaintiffs on this issue because this case involves a statute which expressly restricts the government's authority to pay contractual obligations in excess of appropriations. Accordingly, the only conclusion this court can reach is that the funding of contract support costs must be subject to the availability of appropriations. The court finds the defendants cannot be liable for contract support costs that go beyond the limits of those funds.

In the years in question, the defendants were allocated $7.5 million for payment of new contract support costs. The court finds the plain language of Section 314 caps the amount the government can spend on new contract support costs to $7.5 million. Section 314 states:

Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, except that, for the Bureau of Indian Affairs, tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.

Due to the repeated insufficiency of appropriations to pay contract support costs, the IHS developed a system for payment of new contract support costs. The queue list was designed to allocate the limited funds on a first-come, first-serve basis. In 1997 the IHS had already spent its $7.5 million allotment on tribes ahead of the Cherokee Nation on the queue list. As a result, the Cherokee Nation did not receive any additional funding for contract support costs for those new programs in fiscal year 1997. As to the Shoshone-Paiute tribes, they too did not receive any additional funding for contract support costs for 1996 or 1997 because IHS had already disbursed its $7.5 million allocation to tribes ahead of this plaintiff on the queue list.

This court finds that to allow the IHS to pay additional contract support costs would violate the appropriations clause because it would require spending money that had not been appropriated by Congress. Office of Personnel Management v. Richmond, 496 U.S. 414, 424, 426 (1990) (holding "no money

can be paid out of the Treasury unless it has been appropriated by an act of Congress").

Plaintiffs also argue the holding in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir.1997), supports their position that the cap of $7.5 million for contract support costs is not applicable. However, the Ramah case is distinguishable because the tribes did not ask for amounts over the amount appropriated. In that case, the tribes were disputing how the Bureau of Indian Affairs apportioned the money it was appropriated. Plaintiffs also argue that Section 314 only applies to unobligated balances for 1996 and 1997. As the court discussed previously it has found that there were no unobligated balances for the years 1996-1997.

Further, plaintiffs argue that since a class has not been certified, this case no longer involves "cap" year circumstances. Plaintiffs contend that Congress only began to implement the cap for contract support costs in 1998. However, this court finds that Section 314 applies to the years 1996 and 1997. Section 314 imposes a $7.5 million cap on IHS' payments each year to tribes for contract support costs for their new and expanded programs from 1994 through 1998. This amount had already been disbursed for the years in question. Section 314 bars further payments for those years since no appropriations were available.

Finally, plaintiffs maintain that even if the appropriations were not available, the defendants would still be liable for the contract support costs under governmental contracting principals. Plaintiffs contend the Self-Determination Contracts require the government to pay the full amount of contract support costs. Plaintiffs argue that since they have a statutory right to contract support costs under their contracts and statutes, Congress cannot by Section 314, or otherwise, destroy that right without breaching the contract. However, the cases which plaintiffs cite in support of this proposition are factually

distinguishable from the case at bar. In United States v. Winstar Corporation, 518 U.S. 839 (1996), the United States Supreme Court found the government had, in its contracts, assumed the risk that subsequent changes in the law might prevent it from performing. Id. at 907-910, 116 S. Ct. 2432. In the instant case, there is no evidence that the government intended to assume the risk if Congress failed to provide sufficient appropriations. In fact, after a review of the contracts into which plaintiffs entered, it appears as if plaintiffs assumed the risk of a shortfall. The contracts clearly state that the obligations are subject to the availability of appropriations. Plaintiffs also cite Mobil Oil Exploration and Producing Southeast Inc. v. United States, 530 U.S. 604 (2000), and Schism v. United States, 239 F.3d 1280 (Fed. Cir.2001), for the proposition that the government is liable for a breach of contract. However, this court also finds these cases factually distinguishable. Those cases did not involve a situation like the one in the case at bar where the agency's ability to contractually bind the government was expressly conditioned by a previously enacted statute and by the contract itself on the availability of appropriations.

Accordingly, this court **denies** the plaintiffs' motion for summary judgment on its first and second causes of action as well as their motion for summary judgment for a declaratory action regarding Section 314. Further, the court **grants** the defendants' motion for summary judgment.

IT IS SO ORDERED this 25th day of June, 2001.

/s/_____
Frank H. Seay
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 01-7106

CHEROKEE NATION OF OKLAHOMA; SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,

Plaintiffs-Appellants,

v.

TOMMY G. THOMPSON, Secretary of Health and Human Services; MICHAEL H. TRUJILLO, Director of the Indian Health Service United States Department of Health and Human Services,

Defendants-Appellees.

ORDER

Filed January 22, 2003

Before MURPHY, ANDERSON, and BALDOCK, Circuit Judges.

Appellants' petition for rehearing is denied.[1]

---

[1]Movants' motions for leave to become an amici curiae supporting the appellants' petition for rehearing filed by the Ramah Navajo Chapter, Ogalala Sioux Tribe, Ramah Navajo School Board, Inc., National Congress of American Indians, Norton Sound Health Corporation, Arctic Slope Native Association, Aleutian/Pribilof Islands Association, Bristol Bay Area Health Corporation, Tanana Chiefs Conference, Kodiak Area Native Association, Southeast Alaska Regional Health Corporation and the

(continued...)

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the en banc petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: Deputy Clerk

---

[1](...continued)
Metlakatla Indian Community are denied.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

25 U.S.C. § 450 provides:

(a) Findings respecting historical and special legal relationship; and resultant responsibilities

The Congress, after careful review of the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that–

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

* * *

25 U.S.C. § 450a provides:

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such

services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

* * *

25 U.S.C. § 450b provides:

For purposes of this subchapter, the term–

* * *

(f) "indirect costs" means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

* * *

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter between a

tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: Provided, That except as provided the last proviso in section 450j(a) of this title, no contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;

* * *

25 U.S.C. § 450f provides:

(a) Request by tribe; authorized programs

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs–

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C.A. § 452 et seq.];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C.A. § 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C.A. § 2001 et seq.];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that–

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

* * *

(b) Procedure upon refusal of request to contract

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall–

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a) of this title.

* * *

(e) Burden of proof at hearing or appeal declining contract; final agency action

(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) or any civil action conducted pursuant to section 110(a), the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

(2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the "Department") that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) of this section shall be made either–

(A) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

(B) by an administrative judge.

* * *

25 U.S.C. § 450j provides:

* * *

(b) Payments; transfer of funds by Treasury for disbursement by tribal organization; accountability for interest accrued prior to disbursement

Payments of any grants or under any contracts pursuant to section 450f and 450h of this title may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this part. The transfer of funds shall

be scheduled consistent with program requirements and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds. Tribal organizations shall not be held accountable for interest earned on such funds, pending their disbursement by such organization.

(c) Term of self-determination contracts; annual renegotiation

(1) A self-determination contract shall be–

(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and

(B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

The amounts of such contracts shall be subject to the availability of appropriations.

(2) The amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization.

* * *

25 U.S.C. § 450j-1 provides:

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary

would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which–

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of–

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

* * *

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary–

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) Reductions and increases in amount of fund provided

The amount of funds required by subsection (a) of this section–

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to–

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this subchapter or as provided in section 450j(c) of this title.

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving

a tribe to make funds available to another tribe or tribal organization under this subchapter.

(c) ANNUAL REPORTS.—Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this Act. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this Act, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 105(d).

(d) Treatment of shortfalls in indirect cost recoveries

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

* * *

(g) Addition to contract of full amount contractor entitled; adjustment

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

* * *

(*l*) Suspension, withholding, or delay in payment of funds

(1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self- determination contract, if the Secretary determines that the tribal organization has

failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds.

* * *

25 U.S.C. § 450k provides:

(a) Authority of Secretaries of the Interior and of Health and Human Services to promulgate rules and regulations; time restriction

(1) Except as may be specifically authorized in this subsection, or in any other provision of this subchapter, the Secretary of the Interior and the Secretary of Health and Human Services may not promulgate any regulation, nor impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts, except that the Secretary of the Interior and the Secretary of Health and Human Services may promulgate regulations under this subchapter relating to chapter 171 of Title 28, commonly known as the "Federal Tort Claims Act", the Contract Disputes Act of 1978 (41 U.S.C. § 601 et seq.), declination and waiver procedures, appeal procedures, reassumption procedures, discretionary

grant procedures for grants awarded under section 450h of this title, property donation procedures arising under section 450j(f) of this title, internal agency procedures relating to the implementation of this subchapter, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards, and financial management standards.

(2)(A) The regulations promulgated under this subchapter, including the regulations referred to in this subsection, shall be promulgated–

(i) in conformance with sections 552 and 553 of Title 5 and subsections (c), (d), and (e) of this section; and

(ii) as a single set of regulations in title 25 of the Code of Federal Regulations.

(B) The authority to promulgate regulations set forth in this subchapter shall expire if final regulations are not promulgated within 20 months after October 25, 1994.

* * *

25 U.S.C. § 450*l* provides:

(a) Terms

Each self-determination contract entered into under this subchapter shall–

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section

(with modifications where indicated and the blanks appropriately filled in), and

(2) contain such other provisions as are agreed to by the parties.

* * *

(c) Model agreement

The model agreement referred to in subsection (a)(1) of this section reads as follows:

"Section 1. Agreement between the Secretary and the _____ Tribal Government.

"(a) Authority and Purpose.–

"(1) Authority.–This agreement, denoted a Self-Determination Contract (referred to in this agreement as the 'Contract'), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the 'Secretary'), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and by the authority of the _____ tribal government or tribal organization (referred to in this agreement as the 'Contractor'). The provisions of title I of the Indian Self- Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated in this agreement.

"(2) Purpose.–Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions

thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

"(b) Terms, Provisions, and Conditions.–

* * *

"(4) Funding amount.–Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

* * *

"(6) Payment.–

"(A) In general.–Payments to the Contractor under this Contract shall–

"(i) be made as expeditiously as practicable; and

"(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

"(B) Quarterly, semiannual, lump-sum, and other methods of payment.–

"(i) In general.–Pursuant to section 108(b) of the Indian Self- Determination and Education Assistance Act, and notwithstanding any other provision of law, for each fiscal year covered by this Contract, the

Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement.

"(ii) Method of quarterly payment.–If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection (f)(2), each quarterly payment made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the Contract year coincides with the Federal fiscal year, payment for the first quarter shall be made not later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions, and activities subject to this Contract.

"(iii) Applicability.–Chapter 39 of title 31, United States Code, shall apply to the payment of funds due under this Contract and the annual funding agreement referred to in clause (i).

* * *

"(11) Federal program guidelines, manuals, or policy directives.–Except as specifically provided in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) the Contractor is not required to abide

by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

* * *

"(c) Obligation of the Contractor.–

"(1) Contract performance.–Except as provided in subsection (d)(2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (f)(2) of this Contract.

"(2) Amount of funds.–The total amount of funds to be paid under this Contract pursuant to section 106(a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

"(3) Contracted programs.–Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this Contract and funded through the annual funding agreement under subsection (f)(2).

* * *

"(d) Obligation of the United States.–

"(1) Trust responsibility.–

* * *

"(B) Construction of Contract.–Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility.

"(2) Good faith.–To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.).

* * *

"(e) Other provisions.–

* * *

"(2) Contract modifications or amendment.–

"(A) In general.–Except as provided in subparagraph (B), no modification to this Contract shall take effect unless such modification is made in the form of a written amendment to the Contract, and the Contractor and the Secretary provide written consent for the modification.

"(B) Exception.–The addition of supplemental funds for programs, functions, and activities (or portions thereof) already included in the annual funding agreement under subsection (f)(2), and the reduction of funds pursuant to section 106(b)(2), shall not be subject to subparagraph (A).

* * *

"(f) Attachments.–

* * *

"(2) Annual funding agreement.–

"(A) In general.–The annual funding agreement under this Contract shall only contain–

"(i) terms that identify the programs, services, functions, and activities to be performed or

administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

"(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

"(B) Incorporation by reference.–The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2."

* * *

25 U.S.C. § 450m-1 provides:

(a) Civil actions; concurrent jurisdiction; relief

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to

compel the Secretary to award and fund an approved self-determination contract).

(b) Revision of contracts

The Secretary shall not revise or amend a self-determination contract with a tribal organization without the tribal organization's consent.

* * *

(d) Application of Contract Disputes Act

The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

* * *

25 U.S.C. § 450n provides:

Nothing in this subchapter shall be construed as–

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

Pub. L. 104-134, 110 Stat. 1321-189 (1996) ("FY1996 Appropriations Act") in pertinent part provides:

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,747,842,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 300aaa-2 for services furnished by the Indian Health Service: Provided, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: Provided further, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: Provided further, That $350,564,000 for contract medical care shall remain available for obligation until September 30, 1997: Provided further, That of the funds provided, not less than $11,306,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act, as amended: Provided further, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: Provided further, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall be available for two fiscal years after the fiscal year in which they were collected, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of

planning, design, or construction of new facilities): Provided further, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: Provided further, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1997: Provided further, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act, as amended, shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

Pub. L. 104-208, 110 Stat. 3009-212 (1996) ("FY1997 Appropriations Act") in pertinent part provides:

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,806,269,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 238(b) for services furnished by the Indian Health Service: Provided, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: Provided further, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: Provided further,

That $356,325,000 for contract medical care shall remain available for obligation until September 30, 1998: Provided further, That of the funds provided, not less than $11,706,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act: Provided further, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: Provided further, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall remain available until expended for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): Provided further, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, compacts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: Provided further, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1998: Provided further, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

Pub. L. 105-277, § 314, 112 Stat. 2681-288 (1998) ("Section 314") provides:

Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, except that for the Bureau of Indian Affairs tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.

APPENDIX E

STATUTES CONDITIONING AGENCY CONTRACTING AUTHORITY ON THE AVAILABILITY OF APPROPRIATIONS

1. 7 U.S.C. § 178n(c) ("Notwithstanding any other provision of this subchapter the authority to enter into contracts shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriations Acts.") (Pub. L. 95-592, § 16, Nov. 4, 1978, 92 Stat. 2534).

2. 8 U.S.C. § 1524(b) ("The authority to enter into contracts under this subchapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation Acts.") (June 27, 1952, c. 477, Title IV, Ch. 2 § 414, as added Mar. 17, 1980, Pub. L. 96-212, Title III, § 311(a)(2), 94 Stat. 116).

3. 10 U.S.C. § 1076a(i) ("The authority of the Secretary of Defense to enter into a contract under this section for any fiscal year is subject to the availability of appropriations for that purpose.") (Added Pub. L. 99-145, Title VI, § 651(a)(1), Nov. 8, 1985, 99 Stat. 655).

4. 10 U.S.C. § 2350e(b) ("Authority under this section to enter into contracts shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.") (Added Pub. L. 101-189, Div. A, Title IX, § 932(a)(1), Nov. 29, 1989, 103 Stat. 1536).

5. 10 U.S.C. § 2632(b)(4) ("The authority under subsection (a) to enter into contracts under which the United States is obligated to make outlays shall be effective for any fiscal year only to the extent that the budget authority for such outlays is provided in advance by appropriation Acts.")

(Pub. L. 96-125, Title VIII, § 807(a) to (c)(1), Nov. 26, 1979, 93 Stat. 949, 950).

6. 10 U.S.C. § 2780 (a)(2) ("The authority of the Secretary to enter into a contract under this section for any fiscal year is subject to the availability of appropriations.") (Added Pub. L. 99-661, Div. A., Title XIII, § 1309(a), Nov. 14, 1986, 100 Stat. 3982).

7. 12 U.S.C. § 1715z-1(i)(1) ("The aggregate amount of outstanding contracts to make such payments shall not exceed amounts approved in appropriation Acts . . . .") (June 27, 1934, c. 847, Title II, § 236, as added Aug. 1, 1968, Pub. L. 90-448, Title II, § 201(a), 82 Stat. 498).

8. 15 U.S.C. § 648(*l*) ("The authority to enter into contracts shall be in effect for each fiscal year only to the extent and in the amounts as are provided in advance in appropriations Acts.") (Pub. L. 85-536, § 2[21], as added Pub. L. 96-302, Title II, § 202, July 2, 1980, 94 Stat. 843).

9. 15 U.S.C. § 649b(h) ("The authority to enter into contracts shall be in effect for each fiscal year only to the extent or in the amounts as are provided in advance in appropriation Acts.") (Pub. L. 96-481, Title III, § 302, Oct. 21, 1980, 94 Stat. 2331).

10. 15 U.S.C. § 652(i) ("Any authority to enter contracts or other spending authority provided for in this section is subject to amounts provided for in advance in appropriations Acts.") (Pub. L. 85-536, § 2[25], as added Pub. L. 101-515, Title V, § 7, Nov. 5, 1990, 104 Stat. 2142).

11. 15 U.S.C. § 656(i) ("The authority of the Administrator to enter into contracts shall be in effect for each fiscal year only to the extent and in the amounts as are provided in advance in appropriations Acts.") (Pub. L. 85-536, § 2[29],

formerly § 2[28], as added Pub. L. 102-191, § 2, Dec. 5, 1991, 105 Stat. 1589 (renumbered and amended)).

12. 16 U.S.C. § 284i ("No authority under this subchapter to enter into contracts or to make payments shall be effective except to the extent and in such amounts as provided in advance in appropriations Acts.") (Pub. L. 89-671, § 10, as added Pub. L. 97-310, Oct. 14, 1982, 96 Stat. 1458).

13. 16 U.S.C. § 429b-5(b) ("Notwithstanding any other provision of sections 429b to 429b-5 of this title, authority to enter into contracts, to incur obligations, or to make payments under sections 429b to 429b-5 of this title shall be effective only to the extent, and in such amounts as are provided in advance in appropriation Acts.") (Apr. 17, 1954, c. 153, § 6, as added Oct. 13, 1980, Pub. L. 96-442, § 2, 94 Stat. 1887).

14. 16 U.S.C. § 3208(a) ("No authority to enter into contracts or to make payments or to expend previously appropriated funds under this Act shall be effective except to the extent or in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 96-487, Title XIII, § 1321, Dec. 2, 1980, 94 Stat. 2487).

15. 16 U.S.C. § 3644 ("New spending authority or authority to enter into contracts provided in this chapter shall be effective only to such extent, or in such amounts, as are provided in advance in appropriation Acts.") (Pub. L. 99-5, § 15, Mar. 15, 1985, 99 Stat. 15).

16. 20 U.S.C. § 2392 ("Any authority to make payments or to enter into contracts under this chapter shall be available only to such extent or in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 88-210, Title III, § 312, as added Pub. L. 105-332, § 1(b), Oct. 31, 1998, 112 Stat. 3122).

17. 20 U.S.C. § 3475(b) ("Notwithstanding any other provisions of this chapter, no authority to enter into contracts or to make payments under this subchapter shall be effective except to such extent or in such amounts as are provided in advance under appropriation Acts.") (Pub. L. 96-88, Title IV, § 415, Oct. 17, 1979, 93 Stat. 685).

18. 21 U.S.C. § 1181 ("The authority of the Secretary to enter into contracts under this subchapter and subchapter V of this chapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.") (Pub. L. 92-255, Title IV, § 414, as added Pub. L. 96-181, § 9(a), Jan. 2, 1980, 93 Stat. 1314).

19. 22 U.S.C. § 2194a ("The authority of the Overseas Private Investment Corporation to enter into contracts under section 2194(a) of this title shall be effective for any fiscal year beginning after September 30, 1981, only to such extent or in such amounts as are provided in appropriation Acts.") (Pub. L. 97-65, § 5(b)(2), Oct. 16, 1981, 95 Stat. 1023).

20. 22 U.S.C. § 4609(c) ("Any authority provided by this chapter to enter into contracts shall be effective for a fiscal year only to such extent or in such amounts as are provided in appropriation Acts.") (Pub. L. 98-525, Title XVII, § 1710, Oct. 19, 1984, 98 Stat. 2659).

21. 25 U.S.C. § 640d-11(d)(2) ("The authority of the Commissioner to enter into contracts for the provision of legal services for the Commissioner or for the Office of Navajo and Hopi Indian Relocation shall be subject to the availability of funds provided for such purpose by appropriation Acts.") (As amended Pub. L. 100-666, § 4(a), Nov. 16, 1988, 102 Stat. 3929).

22. 25 U.S.C. § 764(b) ("Provided, That no authority to enter into contracts or to make payments under this subchapter shall be effective except to such extent or in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 96-227, § 5, Apr. 3, 1980, 94 Stat. 319).

23. 25 U.S.C. § 1658 ("The authority of the Secretary to enter into contracts under this subchapter shall be to the extent, and in an amount, provided for in appropriation Acts.") (Pub. L. 94-437, Title V, § 508, as added Pub. L. 100-713, Title V, § 501, Nov. 23, 1988, 102 Stat. 4824).

24. 25 U.S.C. § 1805 ("No authority to enter into contracts provided by this section shall be effective except to the extent authorized in advance by appropriations Acts.") (Pub. L. 95-471, Title I, § 105, formerly § 104, Oct. 17, 1978, 92 Stat. 1326 (renumbered and amended)).

25. 29 U.S.C. § 1581 ("Notwithstanding any other provision of this chapter, no authority to enter into contracts or financial assistance agreements under this chapter shall be effective except to such extent or in such amount as are provided in advance in appropriation Acts.") (Pub. L. 97-300, Title I, § 171, Oct. 13, 1982, 96 Stat. 1354) (repealed Pub. L. 105-220, Title I, § 199(c)(2)(B), Aug. 7, 1998, 112 Stat. 1059).

26. 29 U.S.C. § 2939(f) ("Notwithstanding any other provision of this chapter, the Secretary shall have no authority to enter into contracts, grant agreements, or other financial assistance agreements under this chapter except to such extent and in such amounts as are provided in advance in appropriations Acts.") (Pub. L. 105-220, Title I, § 189, Aug. 7, 1998, 112 Stat. 1051).

27. 38 U.S.C. § 1711(c)(2) ("The authority of the Secretary to enter into contracts under this subsection shall be effective for any fiscal year only to such extent or in such amounts

as are provided in appropriation Acts.") (Pub. L. 96-22, Title II, § 202, June 13, 1979, 93 Stat. 54).

28. 38 U.S.C. § 1712A(e)(3) ("The authority of the Secretary to enter into contracts under this subsection shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.") (Added Pub. L. 96-22, Title I, § 103(a)(1), June 13, 1979, 93 Stat. 48, § 612A).

29. 38 U.S.C. § 1720C(e) ("The authority of the Secretary to enter into contracts under this section shall be effective for any fiscal year only to the extent that appropriations are available.") (Added Pub. L. 101-366, Title II, § 201(a)(1), Aug. 15, 1990, 104. Stat. 437, § 620c (renumbered and amended)).

30. 38 U.S.C. § 1732(d)(1) ("The authority of the Secretary to enter into contracts and to make grants under this section is effective for any fiscal year only to the extent that appropriations are available for that purpose.") (Added Pub. L. 93-82, Title I, § 107(a), Aug. 2, 1973, 87 Stat. 184, § 632).

31. 42 U.S.C. § 238k ("The authority of the Secretary to enter into contracts under this chapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.") (July 1, 1944, c. 373, Title II, § 242, formerly Title V, § 514, as added Nov. 9, 1978, Pub. L. 95-632, § 11(e), 92 Stat. 3456 (renumbered)).

32. 42 U.S.C. § 241(b)(5) ("The authority of the Secretary to enter into any contract for the conduct of any study, testing, program, research, or review, or assessment under this subsection shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance

in appropriation Acts.") (July 1, 1944, c. 373, Title III, § 301, 58 Stat. 691).

33. 42 U.S.C. § 300e-16(c) ("The authority of the Secretary to enter into contracts under subsections (a) and (b) of this section shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.") (July 1, 1944, c. 373, Title XIII, § 1317, as added Nov. 1, 1978, Pub. L. 95-559, § 7(a), 92 Stat. 2134).

34. 42 U.S.C. § 300v-2(c) ("The authority of the Commission to enter into such contracts is effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation Acts.") (July 1, 1944, c. 373, Title XVIII, § 1803, as added Nov. 9, 1978, Pub. L. 95-622, Title III, § 301, 92 Stat. 3440).

35. 42 U.S.C. § 702(a)(1) ("The authority of the Secretary to enter into any contracts under this subchapter is effective for any fiscal year only to such extent or in such amounts as are provided in appropriations Acts.") (Aug. 14, 1935, c. 531, Title V, § 502, as added Aug. 13, 1981, Pub. L. 97-35, Title XXI, § 2192(a), 95 Stat. 819).

36. 42 U.S.C. § 1437c(c)(1) ("The additional authority to enter into such contracts provided on or after October 1, 1980, shall be effective only in such amounts as may be approved in appropriation Acts.") (Pub. L. 96-399, Title II, § 201(a), Oct. 8, 1980, 94 Stat. 1624).

37. 42 U.S.C. § 1437s(g) ("Any authority of the Secretary under this section to provide financial assistance, or to enter into contracts to provide financial assistance, shall be effective only to such extent or in such amounts as are or have been provided in advance in an appropriation Act.") (Sept. 1, 1937, c. 896, Title I, § 21 as added Feb. 5, 1988,

Pub. L. 100-242, Title I, § 123, 101 Stat. 1842) (renumbered and amended).

38. 42 U.S.C. § 2286h ("The authority of the Board to enter into contracts under this subchapter is effective only to the extent that appropriations (including transfer of appropriations) are provided in advance for such purpose.") (Aug. 1, 1946, c. 724, Title I, § 319, as added Sept. 29, 1988, Pub. L. 100-456, Div. A, Title XIV, § 1441(a)(1), 102 Stat. 2083).

39. 42 U.S.C. § 2394 ("The authority to enter into a contract under the preceding sentence with the Los Alamos School Board and with the county of Los Alamos, New Mexico, shall be effective with respect to a period before July 1, 1997, only to the extent or in such amounts as are provided in appropriation Acts.") (Pub. L. 99-661, Div. C, Title I, § 3138(b)(1), Nov. 14, 1986, 100 Stat. 4066).

40. 42 U.S.C. § 4594 ("The authority of the Secretary to enter into contracts under this chapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.") (Pub. L. 91-616, Title VI, § 604, as added Pub. L. 96-180, § 17, Jan. 2, 1980, 93 Stat. 1306).

41. 42 U.S.C. § 5671(a)(7)(B) ("New spending authority or authority to enter into contracts . . . shall be effective only to such extent and in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 93-415, Title II, § 299 formerly § 261, Sept. 7, 1974, 88 Stat. 1129).

42. 42 U.S.C. § 7256(b) ("Notwithstanding any other provision of this subchapter, no authority to enter into contracts or to make payments . . . shall be effective except to such extent or in such amounts as are provided in advance in appropriation Acts.") (Pub. L. 95-91, Title VI, § 646, Aug. 4, 1977, 91 Stat. 599).

43. 42 U.S.C. § 7923 ("The authority under this subchapter to enter into contracts or other obligations requiring the United States to make outlays may be exercised only to the extent provided in advance in annual authorization and appropriation Acts.") (Pub. L. 95-604, Title I, § 113, Nov. 8, 1978, 92 Stat. 3031).

44. 42 U.S.C. § 8274 ("Authority under this part to enter into acquisition contracts shall be only to the extent as may be provided in advance in appropriation Acts.") (Pub. L. 95-619, Title V, § 565, Nov. 9, 1978, 92 Stat. 3281).

45. 42 U.S.C. § 9662 ("Any authority provided by this Act, including any amendment made by this Act, to enter into contracts to obligate the United states or to incur indebtedness for the repayment of which the United States is liable shall be effective only to such extent or in such amounts as are provided in appropriation Acts.") (Pub. L. 99-499, § 3, Oct. 17, 1986, 100 Stat. 1614).

46. 42 U.S.C. § 12377(a) ("New spending authority or authority to enter into contracts as provided in this subchapter shall be effective only to the extent and in such amounts as are provided in advance in appropriations Acts.") (Pub. L. 101-501, Title IX, § 988, Nov. 3, 1990, 104 Stat. 1283).

47. 48 U.S.C. § 1933(j)(3) ("No authority under this subsection to enter into contracts or to make payments shall be effective except to the extent and in such amounts as provided in advance in appropriations Acts.") (Pub. L. 99-658, Title I, § 104, Nov. 14, 1986, 100 Stat. 3675).

48. 49 U.S.C. § 103(e) ("Notwithstanding any other provision of this chapter, no authority to enter into contracts or to make payments under this subsection shall be effective, except as provided for in appropriations Acts.") (Pub. L. 103-440, Title II, § 216, Nov. 2, 1994, 108 Stat. 4624).

49. 50 App. U.S.C. § 1989b-8 ("No authority under this title to enter into contracts or to make payments shall be effective in any fiscal year except to such extent and in such amounts as are provided in advance in appropriations Acts.") (Pub. L. 100-383, Title I, § 109, Aug. 10, 1988, 102 Stat. 910).

50. 50 App. U.S.C. § 1989c-7 ("No authority under this title to enter into contracts or to make payments shall be effective in any fiscal year except to such extent and in such amounts as are provided in advance in appropriations Acts.") (Pub. L. 100-383, Title II, § 208, Aug. 10, 1988, 102 Stat. 916).

Supreme Court, U.S.
FILED
JUN 6 2003
OFFICE OF THE CLERK

No. 02-1472

In the Supreme Court of the United States

CHEROKEE NATION OF OKLAHOMA AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
BARBARA C. BIDDLE
JEFFRICA JENKINS LEE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, authorizes the Secretary of the Interior and the Secretary of Health and Human Services to enter into self-determination contracts with Indian Tribes for the administration of programs that the Secretaries otherwise would administer themselves. The ISDA also provides that the Secretaries shall pay "contract support costs" to cover certain direct and indirect expenses incurred by the Tribes in administering those contracts. The ISDA, however, makes payment on the contracts "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for contract support and other self-determination contract costs. 25 U.S.C. 450j-1(b). The questions presented are:

1. Whether petitioners are entitled to full funding of the contract support costs associated with carrying out self-determination contracts with the Indian Health Service, where appropriations were insufficient to fully fund those costs.

2. Whether Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681-288, bars petitioners from recovering their contract support costs.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	12
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998)	14
Babbitt v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000)	9, 10, 13
Blackhawk Heating & Plumbing Co. v. *United States*, 622 F.2d 539 (Ct. Cl. 1980)	17, 19, 20
Bowen v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986)	18
Calderon v. *Moore*, 518 U.S. 149 (1996)	24
Cherokee Nation v. *United States*, 199 F.R.D. 357 (E.D. Okla. 2001)	8
City of Houston v. *HUD*, 24 F.3d 1421 (D.C. Cir. 1994)	24
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992)	13-14
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987)	15
Grave Mfg. Co. v. *Linde Co.*, 336 U.S. 271 (1949)	15
Lincoln v. *Vigil*, 508 U.S. 182 (1993)	20
National Ass'n of Reg'l Councils v. *Costle*, 564 F.2d 583 (D.C. Cir. 1977)	24
New York Airways, Inc. v. *United States*, 369 F.2d 743 (Ct. Cl. 1966)	12
OPM v. *Richmond*, 496 U.S. 414 (1990)	24, 25
Piamba Cortes v. *American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999)	22

Cases—Continued: Page

Ramah Navajo Chapter v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997) 16
Ramah Navajo Sch. Bd. v. *Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) 10, 13
Red Lion Broad. Co. v. *FCC*, 395 U.S. 367 (1969) 22
Rubin v. *United States*, 449 U.S. 424 (1981) 14
Shoshone-Bannock Tribes v. *Secretary, Dep't of HHS*, 279 F.3d 660 (9th Cir. 2002) 9, 10, 13, 21
United States v. *Doe*, 465 U.S. 605 (1984) 15
United States v. *Larionoff*, 431 U.S. 864 (1977) 21
United States v. *Winstar Corp.*, 518 U.S. 839 (1996) 12, 19

Constitution and statutes:

U.S. Const. Art. I, § 9, Cl. 7 24
Act of Nov. 14, 1997, Pub. L. No. 105-83, 111 Stat. 1583 ... 5
Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* 8
41 U.S.C. 605(c)(5) 8
Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450-450n 2
25 U.S.C. 450a(b) 2
25 U.S.C. 450b(i) 2
25 U.S.C. 450b(j) 18
25 U.S.C. 450f 9
25 U.S.C. 450f(a)(1) 2
25 U.S.C. 450j(a) 18
25 U.S.C. 450j-1(a) 14
25 U.S.C. 450j-1(a)(1) 2-3
25 U.S.C. 450j-1(a)(2) 3, 16
25 U.S.C. 450j-1(b) ..... *passim*
25 U.S.C. 450*l*(a) 3
25 U.S.C. 450*l*(c) 3
25 U.S.C. 450m-1(a) 8
Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-212 to 3009-213 4-5

Statutes—Continued: Page

§ 304, 110 Stat. 3009-220 24
Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, Tit. II, § 314, 112 Stat. 2681-288 ..... 3, 8, 9, 11, 20, 21, 22, 23, 25
Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-189 4
§ 304, 110 Stat. 1321-196 24
12 U.S.C. 1729(f)(2) (1988) 19
25 U.S.C. 13 2
25 U.S.C. 306 9
25 U.S.C. 458aaa-7(c) 5
25 U.S.C. 1601 2
31 U.S.C. 1301(c)(2) 24
31 U.S.C. 1304 25
42 U.S.C. 2001 2

Miscellaneous:

H.R. Rep. No. 173, 104th Cong., 1st Sess. (1995) 3, 4
S. Rep. No. 319, 104th Cong., 2d Sess. (1996) 3, 4
S. Rep. No. 227, 105th Cong., 2d Sess. (1998) 22

In the Supreme Court of the United States

No. 02-1472

CHEROKEE NATION OF OKLAHOMA AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 311 F.3d 1054. The opinion of the district court (Pet. App. 24a-50a) is reported at 190 F. Supp. 2d 1248. An earlier ruling by the district court denying class certification is reported at 199 F.R.D. 357.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2002. A petition for rehearing was denied on January 22, 2003 (Pet. App. 51a-52a). The

petition for a writ of certiorari was filed on April 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, was enacted in 1975 to ensure "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal services and programs provided to the Tribes and their members. 25 U.S.C. 450a(b). Toward that end, the ISDA provides that, at the request of a Tribe, the Secretary of Health and Human Services (the Secretary) must enter into a "self-determination contract" with "a tribal organization," under which the tribal organization will "plan, conduct, and administer programs" previously administered by the Secretary for the benefit of the Indians; ISDA self-determination contracts, however, are not considered procurement contracts. 25 U.S.C. 450f(a)(1).[1] The Secretary has delegated his authority to enter into self-determination contracts to the Indian Health Service (IHS), the component of the Department of Health and Human Services responsible for providing primary health care for American Indians and Alaska Natives throughout the United States, 25 U.S.C. 13, 1601; 42 U.S.C. 2001.

The ISDA requires the Secretary to provide funding under self-determination contracts equal to the amount of funds the Secretary otherwise would have expended if the programs were operated by IHS. 25 U.S.C. 450j-

[1] The Act defines "Secretary" to mean either the Secretary of the Interior, or the Secretary of Health and Human Services, or both. 25 U.S.C. 450b(i). This case involves only contracts between the Tribes and the Secretary of Health and Human Services.

1(a)(1). In addition, the ISDA directs the Secretary to fund direct and indirect costs known as "contract support costs" or "CSCs" to cover certain administrative expenses that would not have been incurred by the Secretary if IHS operated the programs itself. 25 U.S.C. 450j-1(a)(2). The Secretary's obligation to fund self-determination contracts is limited, however, by a succeeding provision of the ISDA. That provision makes payments under self-determination contracts "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for self-determination contracts. 25 U.S.C. 450j-1(b).

Each self-determination contract under the ISDA must contain or incorporate by reference the provisions of a statutory model agreement. 25 U.S.C. 450*l*(a). One mandatory provision of the model agreement states that "*[s]ubject to the availability of appropriations*, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement" negotiated by the parties. 25 U.S.C. 450*l*(c) (emphasis added) (Model Agreement § 1, ¶ (b)(4)).

Congress enacted a further limit on spending for contract support costs under the ISDA in 1998. In earlier years, the committee reports accompanying annual appropriations had "earmarked" certain sums for contract support costs. See, *e.g.*, S. Rep. No. 319, 104th Cong., 2d Sess. 90 (1996); H.R. Rep. No. 173, 104th Cong., 1st Sess. 97 (1995); pp. 4-5, *infra* (discussing specific sums earmarked). Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 Pub. L. No. 105-277, Tit. II, § 314, 112 Stat. 2681-288 (Section 314), provided that, "[n]otwithstanding any other provision of law," the amounts "earmarked" for

contract support costs in those committee reports "are the total amounts available for fiscal years 1994 through 1998 for such purposes."

2. The dispute in this case concerns shortfalls in funding for contract support costs associated with self-determination contracts. Petitioner Shoshone-Paiute Tribes of the Duck Valley Reservation (Shoshone) claims a right to contract support costs associated with the operation of certain ongoing and newly-contracted Indian health care programs for fiscal years 1996 and 1997, and petitioner Cherokee Nation of Oklahoma (Cherokee) claims a right to payment for such costs for fiscal year 1997.

a. For fiscal year 1996, the House Committee on Appropriations recommended that approximately $1.7 billion be appropriated to IHS, with $153 million to be spent on contract support costs for self-determination contracts; of that $153 million, $7.5 million was to be used to pay contract support costs for new or expanded contracts. H.R. Rep. No. 173, *supra*, at 95, 97. In the appropriations act itself, Congress segregated the $7.5 million from the lump-sum Indian Health Services appropriation for a separate Indian Self-Determination Fund, which was to "remain available" for new or expanded contracts "until expended." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-189.

Similarly, for fiscal year 1997, Congress appropriated a lump-sum of approximately $1.8 billion to IHS for Indian Health Services. The committee report earmarked $160,660,000 for contract support costs. S. Rep. No. 319, *supra*, at 90. Of that $160,660,000, Congress again set aside $7.5 million in the Indian Self-Determination Fund to fund contract support costs for new or expanded contracts. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-212 to 3009-213. Finally, for fiscal year 1998, Congress enacted a statutory cap on contract support costs. Act of Nov. 14, 1997, Pub. L. No. 105-83, 111 Stat. 1583 (sum "not to exceed $168,702,000 shall be for payments to tribes * * * for [contract support costs] associated with ongoing contracts or grants or compacts entered into with the [IHS] prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended").

b. Petitioner Shoshone entered into a Compact of Self-Governance and an associated Annual Funding Agreement with the Secretary in 1994. Pet. C.A. App. 293, 330.[2] Shoshone's Annual Funding Agreement for the 1996 fiscal year included a clause stating that "[t]he parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to adjustment due to Congressional action in appropriations Acts or other laws affecting availability of funds to the Indian Health Service." *Id.* at 342. "Upon enactment of any such Act or law," the agreement specified, "the amount of funding provided to the Tribes in this Agreement shall be adjusted as necessary." *Ibid.* Shoshone's Annual Funding Agreement for fiscal year 1997 similarly acknowledged that "[t]he parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to the availability of appropriations." *Id.* at 374.

---

[2] Petitioners are parties to compacts with IHS. However, because self-governance compacts and self-determination contracts are both subject to the same congressional appropriation mechanism, 25 U.S.C. 450j-1(b), 458aaa-7(c), the terms "contract" and "compact" have been used interchangeably throughout this litigation.

Shoshone's fiscal year 1996 Annual Funding Agreement also stated that it was governed by Indian Self-Determination Memorandum 92-2 (ISDM 92-2), which set forth IHS's policy for allocating new contract support costs in accordance with a priority list, or queue. IHS developed the contract-support-cost allocation policy embodied in ISDM 92-2 in consultation with tribal contractors to address chronic congressional underfunding of contract support costs for new or expanded ISDA contracts. Pet. C.A. App. 209, 536-537. Under the policy, approved contract-support-cost requests for new or expanded self-determination contracts were 100% funded on a first-come, first-served basis, as determined by the date on which IHS received the Tribe's request. *Id.* at 340-341, 536.[3]

Accordingly, when Shoshone submitted a request for contract support costs in connection with newly acquired health care programs for fiscal years 1996 and 1997, the requests were placed in the Indian Self-Determination queue. Pet. C.A. App. 241, 537. Those requests, however, did not reach the top of the queue. As a result, Shoshone did not receive any additional funding for contract support costs for those new

[3] Once funds were exhausted, Tribes awaiting new contract-support-cost funding on the priority list would be provided new contract-support-cost funds according to the date of the individual request, if additional appropriations were made available. In any year in which a Tribe reached the top of the queue, it would be paid its new contract support costs for that year and would continue to be paid at least that amount of contract support costs for the newly funded program every year thereafter. Pet. C.A. App. 536. In fiscal year 1999, Congress eliminated the Indian Self-Determination Fund from the Indian Health Services appropriation, and IHS has changed its contract-support-cost distribution methodology accordingly.

programs in either year. Instead, in each of those years, IHS allotted the $7.5 million from the Indian Self-Determination Fund to Tribes that were ahead of Shoshone in the queue. *Id.* at 537; Pet. App. 48a.

c. Petitioner Cherokee operates various IHS-funded health care programs for the benefit of its tribal members under self-determination contracts. For fiscal year 1994, Cherokee entered into a Compact of Self-Governance and associated Annual Funding Agreement with IHS, which covered new and pre-existing programs. Pet. C.A. App. 422. Section 3 of the Compact signed by Cherokee, under the heading "Funding Amount," expressly stated that the Secretary's provision of funds to the Tribe under the Annual Funding Agreement would be "[s]ubject only to the appropriation of funds by the Congress of the United States"; "the use of any and all funds under this Compact," it further stated, "shall be subject to specific directives or limitations as may be included in applicable appropriations acts." *Id.* at 425. Cherokee's Annual Funding Agreement for the 1997 fiscal year similarly acknowledged those limits. "The parties agree that adjustments may be appropriate due to unanticipated Congressional action." *Id.* at 450.

Like petitioner Shoshone, petitioner Cherokee submitted a request for contract support costs for new programs for fiscal year 1997. Like Shoshone's requests, Cherokee's request was placed in the Indian Self-Determination queue, because sufficient congressional appropriations were not available at the time the request was made. Pet. C.A. App. 234, 235, 537. In particular, IHS had already allocated $7.5 million for new contract support costs to Tribes ahead of Cherokee in the queue. Because Cherokee never reached the top of the queue, Cherokee did not receive any additional

funding for contract support costs for its new programs in the 1997 fiscal year. *Id.* at 537; Pet. App. 48a.

3. Petitioners brought this action in district court against the Secretary and the United States, claiming that the ISDA and their contracts entitled them to full payment of all contract support costs.[4] They sought "money damages," as well as a declaratory ruling that Section 314 (discussed pp. 3-4, *supra*) had no application in the case.

On cross-motions for summary judgment, the district court ruled in favor of the government. Pet. App. 24a-50a. The court held that petitioners' ISDA contracts were expressly conditioned on IHS having sufficient funding. *Id.* at 44a-45a. The court found that, because all of the $7.5 million appropriated by Congress for contract support costs for new contracts in fiscal years 1996 and 1997 had been allocated to other Tribes before IHS reached petitioners' requests, petitioners were not entitled to payment. Neither the ISDA nor petitioners' contracts, the court held, obligated IHS to pay contract support costs in excess of appropriated funds. *Id.* at 46a, 48a.

The district court also reasoned that IHS could not use any of its annual lump-sum appropriations to pay

[4] Before filing this lawsuit, petitioners submitted individual claims to the agency pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* When the claims were not decided within the statutory time period, petitioners elected to treat their claims as denied and jointly filed this action in district court. See 25 U.S.C. 450m-1(a); 41 U.S.C. 605(c)(5). The complaint was brought on behalf of petitioners and a putative class of similarly situated Tribes. The district court denied class certification, *Cherokee Nation* v. *United States*, 199 F.R.D. 357 (E.D. Okla. 2001), and petitioners neither challenged that ruling on appeal nor challenge it in this Court.

petitioners' contract support costs "without impairing its ability to discharge its responsibilities with respect to other tribes and individual Indians," which "could severely impair various Indian programs." Pet. App. 46a. The court held that the ISDA itself—and 25 U.S.C. 306, 450f, and 450j-1(b) in particular—provides that the Secretary need not reallocate funds from other tribal programs to pay contract support costs. Pet. App. 46a.

Finally, the court concluded that Section 314, by its plain text, capped the amount that IHS could spend on contract support costs for contracts during the relevant fiscal years. In particular, Section 314 limited contract-support-cost payments to the amounts earmarked in appropriation committee reports for that purpose. Because those sums had already been expended, the court held, petitioners were not entitled to payment. Pet. App. 47a.

4. a. The court of appeals affirmed. Pet. App. 1a-23a. The court first rejected petitioners' claim that they had a statutory right to full payment for contract support costs for ongoing programs, holding that the phrase "subject to the availability of appropriations" in Section 450j-1(b) is "'clear and unambiguous.'" *Id.* at 12a (quoting *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1378 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000)). "By means of this express language," the court explained, "Congress has plainly excluded the possibility of construing the contract support costs provision as an entitlement that exists independently of whether Congress appropriates money to cover it." *Ibid.* (quoting *Shoshone-Bannock Tribes* v. *Secretary, Dep't of HHS*, 279 F.3d 660, 665 (9th Cir. 2002)). The court observed that, by virtue of that language and similar provisions in petitioners' annual funding agree-

ments, IHS's decision not to spend sums beyond those appropriated violated neither the statute nor the contracts. *Id.* at 13a. That conclusion, the court of appeals noted, was consistent with the decisions of three other circuits. *Id.* at 12a-13a (citing *Oglala*, 194 F.3d at 1378; *Shoshone-Bannock*, 279 F.3d at 665; *Ramah Navajo Sch. Bd.* v. *Babbitt*, 87 F.3d 1338, 1345 (D. C. Cir. 1996)).

The court of appeals also explained that, under the ISDA, "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe." Pet. App. 12a. The Secretary thus "need not take money intended to serve non-[contract support cost] purposes under the ISDA in order to meet his responsibility to allocate" contract support costs. *Id.* at 13a. Because Congress had not appropriated sufficient funds to pay petitioners' contract support costs in full without cutting into IHS's funding of other programs, *id.* at 15a, the court held that IHS was not required to pay petitioners' contract support costs, *id.* at 16a-17a.

The court of appeals also rejected petitioners' claim that, with respect to ongoing contracts, petitioners had an "entitlement" to full contract-support-cost funding that "vested immediately, at the beginning of each fiscal year, and, presumably, ahead of other IHS obligations." Pet. App. 15a-16a. Petitioners, the court pointed out, failed to "provide support for that assertion." *Id.* at 16a. "[N]or would that make sense, given the structure of the compacts plaintiffs have with the government, as well as the IHS' numerous other mandatory financial obligations." *Ibid.* Finally, the court of appeals agreed with the district court that IHS had "demonstrated" that paying petitioners' contract support costs "for ongoing contracts would have necessitated a reduction in funding for other tribal programs."

Id. at 15a. The court further held that IHS's allocation of its lump-sum appropriation in accordance with congressional committee report recommendations was a reasonable "exercise of the limited discretion inevitably vested in it." *Id.* at 16a (citation omitted).

b. The court of appeals then turned to the Tribes' argument that they were entitled to contract-support-cost funding for new or expanded programs. The court, relying on the language of the 1996 and 1997 appropriations acts, the House Appropriations Committee reports, and the Ninth Circuit's decision in *Shoshone-Bannock*, held that "Congress intended to limit the amount [of contract support costs] available for new or expanded [contracts] to $7.5 million." Pet. App. 19a-20a. Here, all of the $7.5 million appropriated by Congress for contract support costs for new contracts in fiscal years 1996 and 1997 had been allocated to other Tribes before IHS reached petitioners' requests in the queue. *Id.* at 20a. Accordingly, the court of appeals held that IHS was not obligated to pay contract support costs beyond that sum. *Id.* at 17a, 20a.

Finally, the court of appeals "agree[d] with the district court that § 314 supports [the] conclusion that Congress intended to make available for CSCs for new or expanded contracts in fiscal years 1996 and 1997 *only* $7.5 million." Pet. App. 21a. Through that provision, the court explained, "Congress indisputably indicated [that] no more funds would be available to pay CSCs for those years, and it made it very clear that that is what it intended to appropriate for those years." *Ibid.* While the appropriations committee reports were not by themselves necessarily binding on the agency, the court observed, Section 314 unequivocally "indicated that the earmarked amounts in the committee reports for

ongoing CSCs were intended to be legally binding." *Ibid.*

The court of appeals also rejected petitioners' argument that they had a contractual right to full contract-support-cost funding. Pet. App. 21a-22a. "[B]ecause any contract claim was conditioned on, and subject to, available appropriations," the court held, the agency's decision not to make payments in the face of appropriations shortfalls was permissible. *Id.* at 21a. For that reason, the court of appeals also rejected petitioners' reliance on *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), and *New York Airways, Inc.* v. *United States*, 369 F.2d 743 (Ct. Cl. 1966). "[I]t was always clear and explicit, both in the ISDA and in the contracts with the government, that the funding was subject to available appropriations and, despite [petitioners'] repeated assertions to the contrary, there were, in fact, insufficient appropriations to permit full funding." Pet. App. 22a-23a & n.11.

ARGUMENT

Petitioners contend that the ISDA and their self-determination contracts require full payment of their contract support costs—despite express provisions making payment of such costs contingent on the availability of appropriated funds, despite an express provision stating that the Secretary need not reduce funding for other tribal programs to pay such costs, and despite Congress's failure to appropriate sufficient funds for the payment of such costs. The court of appeals correctly rejected petitioners' arguments, and its decision does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted.

1. Section 450j-1(b) states that, "[n]otwithstanding any other provision" of the ISDA regarding contract funding, "the provision of funds under this subchapter is subject to the availability of appropriations." 25 U.S.C. 450j-1(b). The court of appeals correctly concluded that Section 450j-1(b) unambiguously conditions petitioners' right to payment on the availability of appropriations. See Pet. App. 12a-13a. The other courts of appeals that have considered the issue have unanimously agreed. See *Shoshone-Bannock Tribes* v. *Secretary, Dep't of HHS*, 279 F.3d 660, 664-665 (9th Cir. 2002) ("Because of the express language subjecting provision of [ISDA] funds to 'availability of appropriations,' and the clear statement that this limitation applies 'notwithstanding any other provision in this Act,' Congress has plainly excluded the possibility of construing the [contract support cost] provision as an entitlement that exists independently of whether Congress appropriates money to cover it.") (footnotes omitted); *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1378 (Fed. Cir. 1999) ("The language of § 450j-1(b) is clear and unambiguous; any funds provided under an ISDA contract are 'subject to the availability of appropriations'"; thus, "in the face of congressional under-funding, an agency can only spend as much money as has been appropriated for a particular program."), cert. denied, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd.* v. *Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996) ("[I]f the money is not available, it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it to the funds.").

That construction is supported by elementary canons of statutory construction. "When," as here, "the words of a statute are unambiguous, then * * * 'judicial inquiry is complete.'" *Connecticut Nat'l Bank* v. *Ger-*

main, 503 U.S. 249, 254 (1992) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). It is supported, moreover, by the ISDA's structure. Section 450j-1(a), entitled "Amount of funds provided," establishes the general requirement that the Secretary pay contract support costs. Section 450j-1(b), entitled "Reductions and increases in amount of funds provided," immediately follows Section 450j-1(a). By virtue of its title and placement alike, Section 450j-1(b) is most naturally understood to set forth the conditions under which the Secretary may pay less (or more) than the amount otherwise provided by Section 450j-1(a). See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998).

The ISDA reinforces those limits through the concluding clause of Section 450j-1(b), which states that "the Secretary is *not required* to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." 25 U.S.C. 450j-1(b) (emphasis added). That provision makes it clear that, if paying contract support costs (or other self-determination contract costs) would require the Secretary to reduce funding for other IHS initiatives serving non-contracting (or other) Tribes, contracting Tribes are not entitled to full payment. In this case, "there were simply insufficient appropriations to pay the contract support costs requested by plaintiffs." Pet. App. 46a. As a result, any effort by IHS to use "any of its annual appropriations to pay" those costs would have "impair[ed] its ability to discharge its responsibilities with respect to other tribes and individual Indians," severely "impair[ing] various Indian programs," as the district court and court of appeals both found. *Ibid.* (district court); *id.* at 15a (court of appeals) (government "demonstrated that providing [petitioners] their entire CSCs for ongoing

contracts would have necessitated a reduction in funding for other tribal programs"). In such circumstances, the Secretary was not required to "reduc[e] funding for" other programs "to make funds available" for "self-determination contracts." *Id.* at 46a.[5]

2. Petitioners nonetheless argue that the court of appeals misconstrued Section 450j-1(b). According to petitioners (Pet. 11, 15-16), they had a "vested" contractual right to immediate and full payment of their contract support costs when Congress appropriated money to IHS. They argue that, because (in their view) sufficient funds to pay those costs were "legally available" from IHS's lump-sum appropriation the instant the appropriation was made, IHS was obligated to pay

---

[5] Relying on isolated Presidential budget reports, petitioners (Pet. 7, 16 n.13) appear to challenge the district court's and court of appeals' determination that appropriated funds were insufficient. This Court ordinarily does not grant review to resolve fact-based disputes, much less to review the "concurrent findings of fact by two courts below." See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (quoting *Grave Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949)); see also *United States* v. *Doe*, 465 U.S. 605, 614 (1984). Petitioners, moreover, forfeited any arguments based on those budget reports by failing to present them to the district court. See Gov't C.A. Br. 48 n.21. In any event, the reports raise no material issue of fact, because the reports do not indicate that the allegedly unspent sums were general purpose funds that could be reprogrammed to new purposes, such as contract support costs. To the contrary, unspent funds are often specialized funds (such as the proceeds of reimbursements) that can be used only for particular purposes. Here, the government offered undisputed evidence that the annual appropriations were insufficient to pay contract support costs without "us[ing] money otherwise dedicated to other purposes supporting health services delivery to the tribes." Pet. App. 14a; see *id.* at 15a. Petitioners' belated citation to the budget reports does not create a genuine issue of material fact, and certainly does not warrant this Court's review.

those costs (ahead of other priorities) notwithstanding Section 450j-1(b). Pet. 15.

a. Petitioners provide no sensible reason why Section 450j-1(b) should be interpreted in that distorted, chop-logic fashion. Although the ISDA requires that contract support costs "shall be added to" the amount of direct program funding a Tribe receives, 25 U.S.C. 450j-1(a)(2), the Act also makes clear that—"[n]otwithstanding any other provision" in the Act—the Secretary's obligation to fund self-determination contracts, including contract support costs, "is subject to the availability of appropriations." 25 U.S.C. 450j-1(b). The Act nowhere suggests that "availability" means *theoretical* or *legal* availability, the hypothetical moment after Congress enacts an appropriation, rather than practical availability. To the contrary, "availability" should be read in a realistic fashion in view of competing claims and priorities. Indeed, the Act confirms that construction, specifying that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization" for self-determination contracts. *Ibid.*; see *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1456 (10th Cir. 1997) (the Secretary must "continue to provide direct services to a tribe until such time as the tribe chooses to enter into a 'self-determination contract'").

In essence, petitioners argue that the Secretary—faced with the limitations of a finite appropriation and competing claims for funding—was obligated to pay their claims ahead of all other priorities because, at the moment Congress made the appropriation, the appropriation exceeded the amount of their claims. That contention, however, turns Section 450j-1(b) on its head. Under that construction, the Secretary must pay

indirect and other contract support costs first and use only the residue to furnish the core funding for all other programs. But Section 450j-1(b) unmistakably provides for the opposite result, declaring that the Secretary need not reduce funding for other programs to finance self-determination contracts. The court of appeals thus did not err in rejecting petitioners' claim that, despite Section 450j-1(b), the Secretary was required to "rob Peter to pay Paul"—or rob other Tribes of needed programs to pay petitioners' contract support costs. Instead, Section 450j-1(b) was clearly designed to foreclose that result.

b. Contrary to petitioners' assertions (Pet. 15-19), the court of appeals' reading of Section 450j-1(b) does not conflict with *Blackhawk Heating & Plumbing Co.* v. *United States*, 622 F.2d 539 (Ct. Cl. 1980). In *Blackhawk*, the former Court of Claims held that the right to payment under a government procurement contract settlement agreement, although conditioned on the availability of appropriations, nonetheless became a vested right at the time a payment fell due, because "appropriated funds were available" at that time. *Id.* at 553. Relying on dictum in a footnote in the *Blackhawk* opinion, petitioners contend that it is irrelevant whether the Secretary would have had to reprogram funds from other priorities to pay contract support costs. Pet. 15 (quoting *Blackhawk*, 622 F.2d at 552 n.9).

There are three problems with that contention. First, unlike 25 U.S.C. 450j-1(b), neither the contract nor the statute at issue in *Blackhawk* included a provision declaring that the agency would *not* be required to reprogram funds in order to make contract payments. In contrast, the ISDA does. "Notwithstanding any other provision in this subchapter," Section 450j-1(b) declares, "the Secretary is *not* required to reduce

funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." 25 U.S.C. 450j-1(b) (emphasis added). Because there was no such provision in *Blackhawk*, the Court of Claims had no reason to consider its effect.

Second, *Blackhawk* concerned the interpretation of a procurement contract. Congress has made it clear that ISDA contracts are not procurement contracts. 25 U.S.C. 450b(j), 450j(a). Instead, they are government-to-government funding arrangements. Compare *Bowen* v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 51-56 (1986). Section 450j-1(b), moreover, is a reflection of the fundamentally different nature of government-to-government agreements like ISDA self-determination contracts. Under those agreements, the Tribe is substituted for a federal agency in furnishing governmental services. Just as a federal agency administering those programs directly would be constrained by the availability of appropriations and the allocation of funds among its programs, Congress made sure that the same principle would apply when Tribes provided the same services pursuant to self-determination agreements. That is, Congress provided that Tribes choosing to administer programs in place of a federal agency would be subject to the same funding limitations the federal agency would face if it continued to administer those programs itself.

Third, to the extent *Blackhawk* is relevant here, it supports the Secretary's position. *Blackhawk* specifically recognized that Congress can condition "the Government's liability * * * upon the continuing availability of appropriated funds *to the agency*. The risk perceived in this contingency having come about, the Government's liability, by the terms of the agreement,"

can be "thereby extinguished." 622 F.2d at 553. Here, the ISDA and petitioners' contracts placed the risk of insufficient appropriations not on the government but on the Tribes. See pp. 5-7, *supra*. Petitioners willingly accepted that risk. The "contingency having come about," however, they now seek to evade both the terms of their agreements and the unambiguous text of Section 450j-1(b).

For the same reasons, petitioners' reliance on *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), is misplaced. In *Winstar*, the plurality accepted the contention that "the Government assumed the risk that subsequent changes in the law might prevent it from performing, and agreed to pay damages in the event that such failure to perform caused financial injury." 518 U.S. at 871 (plurality opinion). The relevant statute there, 12 U.S.C. 1729(f)(2) (1988), moreover, authorized the Federal Savings and Loan Insurance Corporation "to guarantee [acquiring thrifts] against loss" that might occur as a result of a supervisory merger. 518 U.S. at 883. Here, in contrast, both the ISDA itself and the funding agreements under it anticipated the possibility of insufficient appropriations, and they placed the risk of insufficiency *on petitioners*. Funding for the services, they provide, is conditioned on the availability of appropriations (just as it would be if the federal agency continued to provide those services itself). See pp. 3, 5-7, 13-15, *supra*. Furthermore, nothing in the ISDA or the funding agreements purports to make the government liable in damages in the event of an appropriations shortfall. Indeed, any such provision would make Section 450j-1(b) and the limits on funding obligations it establishes a virtual nullity.

c. Nor is there any merit to petitioners' argument (Pet. 17-19) that the decision below is inconsistent with

cases holding that appropriation committee recommendations regarding the allocation of lump-sum appropriations are not binding law. See *e.g.*, *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993); *Blackhawk*, 622 F.2d at 547 n.6. The decision below nowhere held that the committee report earmarks were binding on the agency. Rather, the court of appeals observed that, "while the Tribes correctly argue that the earmark recommendations of a committee are not typically legally binding, the IHS is likewise not obligated to completely ignore them." Pet. App. 16a (footnote omitted). The court of appeals reasoned that the agency's decision to follow the allocation plan recommended in the committee reports was a reasonable "exercise of the limited discretion inevitably vested in it." *Ibid.* Indeed, as this Court has explained, it can be unwise for an agency to ignore such recommendations, because "an agency's decision to ignore congressional expectations may expose it to grave political consequences." *Lincoln*, 508 U.S. at 193.

In this case, in any event, Congress made its intent to establish binding limits on contract-support-cost payments clear by enacting Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-288. Section 314 specifies that, "[n]otwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports * * * for contract support costs associated with self-determination or self-governance contracts * * * *are the total amounts available for fiscal years 1994 through 1998 for such purposes.*" § 314, 112 Stat. 2681-288 (emphasis added). The court of appeals properly construed that provision as a binding command:

> Whether we view this as a retroactive law, or as merely a clarification of the prior Appropriations Acts, Congress could not have been clearer as to its intent * * * that "the amounts appropriated to or earmarked in committee reports . . . are the total amounts available." Thus, Congress indisputably indicated no more funds would be available to pay CSCs for those years, and it made it very clear that that is what it intended to appropriate for those years.

Pet. App. 21a.

The only other court of appeals to have construed Section 314 reached the same conclusion. See *Shoshone-Bannock*, 279 F.3d at 668. In that case too, a Tribe sought additional contract-support-cost funding associated with new programs for fiscal year 1996. The Ninth Circuit concluded that Section 314 retroactively cured any ambiguity in whether the IHS could "limit its expenditures on contract support costs to the $7.5 million" earmarked in the committee report, or instead had "to use whatever it takes of its entire $1.7 billion appropriation." 279 F.3d at 667, 668. In so holding, the Ninth Circuit found that Section 314 represents "'the clear expression of congressional intent'" necessary to establish retroactive legislation. *Id.* at 668 (quoting *United States* v. *Larionoff*, 431 U.S. 864, 879 (1977)).

3. Perhaps recognizing that Section 314 is, by itself, fatal to their claims, petitioners challenge the court of appeals' construction of that provision as well. The "conclusion that Congress can enact retroactive legislation that alters pre-existing law and contract terms in the guise of a 'clarification,'" petitioners argue, "is directly at odds with the law of other Circuits and this Court." Pet. 19.

That contention, too, lacks merit. To begin with, the only other court of appeals that has addressed the meaning of Section 314 read it in precisely the same fashion as the decision below. See p. 21, *supra* (discussing *Shoshone-Bannock*). That construction, moreover, is consistent with the precedent cited by petitioners (Pet. 21-22), such as *Piamba Cortes* v. *American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999). In *Piamba Cortes*, the Eleventh Circuit opined that "[a] significant factor [in determining whether an amendment clarifies prior law] is whether a conflict or ambiguity existed with respect to the interpretation of the relevant provision when the amendment was enacted. If such an ambiguity existed, courts view this as an indication that a subsequent amendment is intended to clarify, rather than change, the existing law." *Id.* at 1283-1284. As petitioners note (Pet. 14 n.9), Section 314 was enacted in the wake of litigation concerning whether the government could be held liable for the full amount of contract support costs requested for new or expanded programs. See S. Rep. No. 227, 105th Cong., 2d Sess. 52 (1998). Thus, even under the authority relied on by petitioners, the Tenth Circuit's reading of Section 314 as a clarification of the earlier appropriations acts is correct.[6] Whether or not Section 314 is properly characterized as a "clarification" or a "change" in law, moreover, is a highly case-specific question.

---

[6] Nor does *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), require a different outcome. In *Red Lion*, this Court held that Congress "ratified" the administrative construction of a statute "with positive legislation." *Id.* at 381-382. Section 314 similarly confirms the correctness of—it ratifies—the Secretary's decision to allocate funds for contract support costs in accordance with the committee report earmarks.

Petitioners' argument also seems to rest on the erroneous premise that Section 314 is impermissible because it abrogates "vested" rights. Pet. 19; see Pet. 21 ("retroactive change impacting vested rights"). Even before Section 314's enactment, however, petitioners never had an absolute right to full funding of their contract support costs. See pp. 15-17, *supra*. Instead, as the court of appeals correctly observed, "[i]t was always clear and explicit, both in the ISDA and in [petitioners'] contracts with the government, that the funding was subject to available appropriations," and that the agency would not be required to reprogram funds from other programs to make up for shortfalls. Pet. App. 22a-23a n.11. Nothing in the statute or petitioners' contracts specifies that Congress cannot affect the sums appropriated for one year through laws enacted in later years. In any event, petitioners received everything to which their contracts entitled them—payment for contract support costs *subject to* the availability of appropriations.[7]

4. Finally, we note a potential jurisdictional barrier. Petitioners' claims for additional payment from IHS

---

[7] Petitioners engage in hyperbole when they suggest that the decision below represents an "unprecedented expansion" of Congress's powers, Pet. 19, that "eviscerate[s]" the "whole concept of a government contract obligation * * * with disturbing consequences for thousands of federal contractors," Pet. 11-12. In fact, this case concerns the proper construction of the particular language of 25 U.S.C. 450j-1(b)—including its declaration that the Secretary need not decrease funding for other programs to pay self-determination contract costs—and corresponding provisions of petitioners' self-determination contracts. See p. 18, *supra* (discussing distinct nature of government-to-government agreements). Petitioners cite no case outside the context of Indian self-determination contracts that involves similar language or limits on payment obligations.

appropriations in the relevant fiscal years are likely moot, because the lump-sum appropriations for those years were "one-year" appropriations that have now lapsed. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 304, 110 Stat. 1321-196 ("No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein."); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 304, 110 Stat. 3009-220 (1996) (same); see 31 U.S.C. 1301(c)(2) (an annual appropriation generally may not be construed to be available beyond the specific year of the appropriation unless the appropriation "expressly provides that it is available after the fiscal year covered by the law in which it appears").[8]

Petitioners' complaint in this case was not filed in district court until March 1999 (Pet. C.A. App. 4), well after the close of both fiscal years at issue. Where, as here, "budget authority has lapsed before suit is brought, there is no underlying congressional authorization * * *. It has vanished, and any order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorizations in the Congress." *National Ass'n of Reg'l Councils* v. *Costle*, 564 F.2d 583, 588-589 (D.C. Cir. 1977); see U.S. Const., Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); see *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990); see also *City of Houston* v. *HUD*, 24 F.3d 1421, 1428 (D.C. Cir. 1994) (where "the

[8] Although this argument was not raised earlier, mootness is jurisdictional and may be raised at any time. *Calderon* v. *Moore*, 518 U.S. 149 (1996).

relevant appropriation has lapsed or been fully obligated * * * the federal courts are without authority to provide monetary relief"). Congress, moreover, has barred the payment of such costs through Section 314, which provides that, "[n]otwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports * * * for contract support costs * * * are the total amounts available * * * for such purposes." § 314, 112 Stat. 2681-288. Because petitioners cannot obtain the relief they seek, their claims are moot.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
BARBARA C. BIDDLE
JEFFRICA JENKINS LEE
Attorneys

JUNE 2003

[9] Petitioners appear to rely (Pet. 16-17 n.13) on the judgment fund, 31 U.S.C. 1304. But the "general appropriation for payment of judgments * * * does not create an all-purpose fund for judicial disbursement." *OPM* v. *Richmond*, 496 U.S. 414, 432 (1990). Here, moreover, Congress has declared that, "[n]otwithstanding any other provision of law," the amounts earmarked in the committee reports are "the total amounts available" for "contract support costs" for the relevant years. § 314, 112 Stat. 2681-288. The federal courts may not circumvent that limit on contract support costs by directing payment pursuant to the provisions of law establishing the judgment fund.

Supreme Court, U.S.
FILED
JUN 16 2003
OFFICE OF THE CLERK

No. 02-1472

IN THE

Supreme Court of the United States

CHEROKEE NATION and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

Of Counsel:

CARTER G. PHILLIPS
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

RIYAZ KANJI
KANJI & KATZEN
201 South Main St.
Ann Arbor, MI 48104
(734) 769-5400

LLOYD BENTON MILLER *
HARRY R. SACHSE
ARTHUR LAZARUS, JR., PC
MELANIE B. OSBORNE
NACOLE D. HESLEP
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20007
(202) 682-0240

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF AUTHORITIES

CASES	Page
Babbitt v. Oglala Sioux Tribal Public Safety Dep't, 194 F.3d 1374 (Fed. Cir. 1999)	8, 9
Bath Iron Works Corp. v. United States, 20 F.3d 1567 (Fed. Cir. 1994)	10
Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539 (Ct. Cl. 1980)	1, 3, 4, 6, 8
Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Resources, 532 U.S. 598 (2001)	3
Busby School of the Northern Cheyenne Tribe v. United States, 8 Cl.Ct. 596 (1985)	5
Gooayear Atomic Corp. v. Miller, 486 U.S. 174 (1988)	3
Holloway v. United States, 526 U.S. 1 (1999)	7
INS v. St. Cyr, 533 U.S. 289 (2001)	3
Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272 (11th Cir. 1999)	10
Pierce County v. Guillen, 123 S.Ct. 720 (2003)	7
Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996)	6, 9
Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969)	9, 10
Shoshone-Bannock Tribes v. Secretary, DHHS, 279 F.3d 660 (9th Cir. 2002)	2
United States v. Winstar, 518 U.S. 839 (1996)	1, 8, 9, 10

CONSTITUTIONAL PROVISIONS	
U.S. Const., Art. I, § 9, cl. 7	10

TABLE OF AUTHORITIES—Continued

STATUTES	Page
5 U.S.C. § 702	10
25 U.S.C. § 450j(a)(1)	5
25 U.S.C. § 450j-1(a)	6
25 U.S.C. § 450j-1(b)	5
25 U.S.C. § 450j-1(b)(1)	6, 7
25 U.S.C. § 450j-1(b)(3)	6, 7
25 U.S.C. § 450j-1(b)(4)	6, 7
25 U.S.C. § 450j-1(b)(5)	6
25 U.S.C. § 450m-1	5
25 U.S.C. § 450m-1(a)	5, 8, 10
25 U.S.C. § 450m-1(d)	5, 10
31 U.S.C. § 1304(a)	10
41 U.S.C. § 601 *et seq.* ("Contract Disputes Act")	5, 10
41 U.S.C. § 605(a)	10
Pub. L. 104-134, 110 Stat. 1321 (1996)	5
Pub. L. 105-277, § 314, 112 Stat. 2681-288 (1998)	3, 9, 10
LEGISLATIVE MATERIALS	
H.R. Conf. Rep. 103-740 (1994)	7
H.R. Rep. 103-158 (1993)	7
S. Rep. 100-274 (1987)	5, 6
S. Rep. 103-294 (1994)	7
S. Rep. 105-227 (1998)	10
COMPTROLLER GENERAL OPINIONS	
Matter of Forest Service, B-231711, 1989 WL 240615 (Comp. Gen. Mar. 28, 1989)	2
OTHER AUTHORITIES	
U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (*available on* Westlaw under "GAO REDBOOK")	2

1a. The government constructs the bulk of its opposition on the erroneous proposition that appropriations to pay these contractors never were available in the first place. Accordingly, the government contends, there are no conflicts between the decision below and either the *Winstar* family of cases forbidding the government from unilaterally altering its contract obligations, or the *Blackhawk* family of cases holding the government liable when it fails to pay a contractor at a time when agency appropriations are legally available to so. *See United States v. Winstar*, 518 U.S. 839 (1996); *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980). But the very issue of "availability" is what produces one of the conflicts giving rise to the petition, for under the Federal Circuit's *Blackhawk* approach appropriations were available, while under the decision below they were not. The government cannot wish away the conflict by simply positing that the Tenth Circuit's approach is correct.

The government's argument rests on the following syllogism: Petitioners' contracts were subject to the "availability of appropriations," Congress here limited the "availability" of the appropriations, and so the government was excused from paying fully on the contracts. The only problem with this argument is that Congress at the legally relevant times never limited the appropriations in any way. The government concedes as much, stating only that contract payments were supposedly limited by "committee reports," Resp. Br. 3, which merely "recommended" how the agency might spend its lump sum appropriation. *Id.* 4. *See also id.* 4-5 ("The committee report earmarked [a stated sum]" (emph. added)). The government recognizes that in a subsequent contract year "Congress enacted a statutory cap on contract support costs" by providing that an amount "not to exceed" a stated sum was legally available to pay contract support costs that year, *id.* 5 (emph. added), but glosses over the fact that in the two years relevant here Congress enacted no statutory cap on such costs. To be clear, at the time each payment came due – not

years later thanks to a retroactive rider—no provision of any act of Congress limited the availability of the Indian Health Service's appropriation to pay these contractors to a designated "not to exceed" amount. This was the case both for contract support costs associated with "ongoing" contracts and those associated with "new" contracts.[1]

b. Mindful that the appropriations acts on their face reveal that the ISDA's routine "availability of appropriations" clause was *never* triggered here, the government advances the audacious proposition that when Congress used the time-worn term of art "availability of appropriations," it actually meant not their "*legal* availability" but their "practical availability." *Id.* 16 (emph. in original). But the government offers no support whatsoever for such a sweeping redefinition, one that would leave it not to Congress, but to the whim of often hostile and self-interested federal bureaucrats to decide when appropriations are actually available to pay a government contractor. The term of art "availability of

[1] As to the latter costs (which were at issue for the Shoshone-Paiute FY1996 contract only, and a small portion of the Cherokee FY1997 contract), the government does not defend the court of appeals' erroneous conclusion that when Congress "set aside $7.5 million in the Indian Self-Determination ["ISD"] Fund" for potential future year expenditures, Resp. Br. 4, Congress also fixed the maximum amount that could be spent on such costs in the current year. *See* Pet. 19a-20a n.10. The government's reluctance here is consistent with its concession elsewhere that "the appropriation of $7.5 million for the ISD Fund [in the FY1996 and FY1997 appropriations acts] was not a statutory 'cap,'" Aplts' Br. 16, filed in *Shoshone-Bannock Tribes v. Secretary, DHHS*, 279 F.3d 660 (9th Cir. 2002), and that "[i]n order to be a statutory cap, the language would have to read that 'not to exceed' $7.5 million was available for new CSC, rather than that $7.5 million 'shall remain available.'" *Id.* 30 n.20. *See also Matter of Forest Service*, B-231711, 1989 WL 240615, at *2 (Comp. Gen. Mar. 28, 1989) (statutory term of art "shall remain available" only designates a special period during which the stated sum may be spent, *not* a maximum earmark on what is legally available in the current year); U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW approvingly, at 6-8 (citing *Forest Service* as "B-231711").

appropriations" has a long and well-understood pedigree in federal appropriations law. Pet. 12-13, 15-16. Not only is Congress presumed to be "knowledgeable about existing law pertinent to the legislation it enacts," *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988), but it is especially presumed to know the meaning of commonly used "terms of art." *INS v. St. Cyr*, 533 U.S. 289, 312, n.35 (2001) (internal quotation omitted); *see also Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 615-16 (2001) (Scalia, Thomas, JJ. concurring) ("[w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning").

2a. Because neither appropriations act limited the "availability of appropriations" to pay these contracts, the decision below is in direct conflict with the Federal Circuit's *Blackhawk* rule. In *Blackhawk*, a plumbing company entered into a settlement agreement with the Veteran's Administration under which the agency agreed to make two payments, the first on December 10, 1973, and the second on January 30, 1974. 622 F.2d at 544, 553. The parties understood that the agency had not internally budgeted for either payment and therefore it would have to reprogram its funds accordingly. *Id.* at 547-48 & n.6. They also agreed that "[the] Government's obligation [under the Agreement] is contingent on the availability of appropriated funds from which payment in full can be made." *Id.* at 542. On January 3, 1974, Congress intervened with "Section 301," *id.* at 545, an appropriations rider that (not unlike Section 314 here) purported to prohibit the agency, both prospectively and retroactively, from making any settlement payments absent specific statutory approval. *Id.* at 552.

Although the government prefers to focus on the second, post-rider payment, what is relevant here is that, as to the first payment—due before the rider's enactment—the court found Section 301 ineffective: "As to the first principal payment, however, appropriated funds were available at the time that

payment fell due [*i.e.*, three weeks before Section 301's enactment]," *Blackhawk*, 622 F.2d at 553 (emph. added), holding squarely that "[t]he right to the first payment was a vested right." *Id.* (emph. added). With respect to the government's same 'internal budgeting-reprogramming' defense advanced here, the court noted that the agency had "lump-sum appropriations," *id.* at 547, and thus held that agency "reprogramming" issues were "purely of an in-house accounting nature and, as such are irrelevant to any determination regarding the availability of appropriated funds," *id.* at 552 n.9 (emph. added). This is hardly the "*dictum*" the government would now have the Court ignore. Resp. Br. 17. *Blackhawk* thus is doubly irreconcilable with the Tenth Circuit's contrary decisions that (1) an internal agency budget can cut off the availability of an appropriation to pay a contract, and (2) a retroactive rider can eliminate vested contract rights. These conflicts alone warrant certiorari.

These are not mere technicalities, for they cut to the heart of the government's contracting relations, most of which occur in the context of similar lump-sum appropriations. If either an agency can internally budget (or rebudget) its appropriations with impunity, or Congress can step in long after the fact and do the same, there is absolutely no reliability left in government contract law. Contracts will thus be illusory. The danger of such a principle, and the insidious uncertainty the decision below will spawn, are additional compelling reasons to grant the petition.

b. The government's remaining attempts to make *Blackhawk* go away are make-weight. For instance, the government argues that these contractors should lose because "ISDA contracts are not procurement contracts." Resp. Br. 18. But the government never explains why this distinction makes a difference. Indeed, it fails to note that the agreement enforced in *Blackhawk* under similar circumstances was not a procurement contract either. Moreover, despite Congress' having relieved tribal contractors of the heavy burden of the

Federal Procurement Policy Act and its implementing regulations, § 450j(a)(1), Congress without qualification still made ISDA contracts fully enforceable under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* ("CDA"), just like any other routine government contract (whether called "procurement" or not). 25 U.S.C. § 450m-1(a), (d).[2]

The government also advances the creative notion that since these particular contracts are between two governments, they are actually less worthy of full enforcement than other government contracts. Resp. Br. 18. Piling on, the government argues that since Congress might limit the agency's available appropriations, the contractor could not have a vested interest in those agreements. But this thesis simply begs the question of whether appropriations were "available" in the first place, an issue on which the government cannot prevail without resort to its extreme reinterpretation of that term of art to mean whatever sum an agency decides to pay in light of "competing claims and priorities." *Id.* 16.

As an alternative, the government argues that these contractors were not entitled to be paid at the beginning of the year anyway. Resp. Br. 10-11. But the contracts conclusively demonstrate otherwise, Pet. 8-9 nn.5-6, and Congress confirmed the timing of these contracts. *E.g.*, Pub. L. 104-134, 110 Stat. 1321-189 (1996) (contract payment "shall be deemed to be obligated at the time of the . . . contract award"). It is not a matter of paying these government contractors ahead of others, but simply of paying them on time.

3. Throughout its opposition the government argues that, although petitioners might otherwise prevail under hornbook appropriations and contract law, the ISDA trumps that law because the last few words of 25 U.S.C. § 450j-1(b), dealing with reductions in funding, protect "programs, projects or

---

[2] *See also* S. Rep. 100-274 (1987), at 34-36 (§ 450m-1 overrules *Busby School of the Northern Cheyenne Tribe v. United States*, 8 Cl.Ct. 596, 600 (1985), which held that as non-procurement contracts, ISDA agreements were not enforceable under the CDA).

activities serving a tribe." Resp. Br. 17-18 (clause distinguishes case from *Blackhawk*), 23 (clause means "agency would not be required to reprogram"). But whatever the meaning of that narrow provision,[3] it only offers limited protection to programs truly "serving a tribe," three key words the government's Opposition repeatedly, and tellingly, omits. Resp. Br. 16 (three times mentioning instead other "priorities"), 17 ("other programs" or "other priorities"), 23 ("other programs").

As Congress recognized, the Secretary does far more than just administer "programs . . . serving a tribe." In this regard, Congress included in the ISDA extensive provisions underscoring those considerable aspects of the agency's appropriation that were not to be protected from the Act's command, and behind which the agency could *not* hide to avoid its payment obligations. Thus, Congress in the ISDA specified that "[t]he amount of funds required by [§ 450j-1(a)] . . . shall not be reduced to make funding available for contract monitoring or administration by the Secretary," § 450j-1(b)(1); "shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract," § 450j-1(b)(4); and "shall not be

[3] The government's breathtakingly broad reading of this clause would permit the Secretary never to pay an ISDA contractor anything at all, so long as the agency spends all its appropriations on something else—other "priorities." Such a reading is not credible in a statute that virtually reeks of an intent to rein in a malfeasant agency and guarantee to tribal contractors enforceable contract rights. *See generally* S. Rep. 100-274, at 7-10, 20-21, 30-31, 37-38 (detailing agency misconduct from 1975 to 1987); *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1344-45 & n.9 (D.C. Cir. 1996) (discussing agency failures and adding "[p]recisely because the Secretary had consistently failed to behave in a reasonable manner . . . Congress elected specifically to cabin the Secretary's discretion under the Act"). Lest the whole statutory scheme be jettisoned on the basis of these few words, the "reduction" clause more plausibly only limits the Secretary's power, reserved in the immediately preceding subsection (5), to "increase[ ]" the amount of a contract.

reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring," § 450j-1(b)(3). (Emph. added.) These detailed statutory provisions confirm that such amounts, running in the hundreds of millions of dollars, are legally available to be reprogrammed to fully pay ISDA contractors.[4]

In the end, all the government does is press the proposition, accepted below in the form of improper "find[ing]s," Pet. 24a (made without benefit of trial and in the context of a pre-discovery summary judgment motion), that paying fully these contractors would have caused adjustments in tribal programs someplace else. Of course adjustments would have to be made if these payments had not already been internally budgeted, but in agency administration, not tribal programs.

[4] As the record reflects, the Secretary held aside millions of dollars to pay for multiple layers of federal administration and other objectives targeted by Congress in §§ 450j-1(b)(1), (3) and (4). *E.g.*, Pet. C.A. App., Fitzpatrick Declaration, at 530-33 (describing over $400 million retained each year in IHS Headquarters for, *inter alia*, "inherently federal functions;" "Self-Governance [contract] negotiation[s];" and "Headquarters administrative support functions") & 541 (describing $47.7 million spent on "Direct Operations" for Area and Headquarters administration). IHS did so even in the face of repeated appropriations committee warnings imploring IHS to reprogram and restructure its operations in order to pay its contractors in full. *E.g.*, H.R. Conf. Rep. 103-740, at 51 (1994); S. Rep. 103-294, at 110 (1994); H.R. Rep. 103-158, at 100 (1993) (all demanding IHS reduce administrative activities and restructure in order to fund ISDA self-governance compacts). Not only is it perfectly "logic[al]," Resp. Br. 16, for Congress to offer a measure of protection only to programs "serving a tribe," while offering none to the government's own internal bureaucracy, but to read the ISDA otherwise would improperly "exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit," *Holloway v. United States*, 526 U.S. 1, 9 (1999), rendering Congress's express prohibitions in §§ 450j-1(b)(1), (3) & (4) nothing but "an exercise in futility," *Pierce County v. Guillen*, 123 S.Ct. 720, 730 (2003).

If the mere fact of an adjustment anywhere were sufficient to cut off contractors' rights, there would be nothing "contractual" at all to government contracts. This is not the law under *Blackhawk* and *Winstar*, and the Tenth Circuit's suggestion otherwise is a compelling reason to grant the petition.

4. The government's effort to distance this case from *Winstar* suggests that the Act and the contracts "placed the risk of insufficiency *on petitioners*." Resp. Br. 19. But even assuming that is true, the converse is surely true too: when contract payments come due and the risk of unavailable appropriations does not materialize (as was the case here), under § 450m-1(a) the government is liable for the resulting "money damages" if it nonetheless fails to pay. It is ludicrous to suppose that in the commonplace setting of contracts with "availability" clauses, contractors never have repose and certainty in their rights, and that the mere possibility of future retroactive legislation means such contractors have no real rights in the first place. It is precisely because contractors should be able to count on government agencies to honor their responsibilities out of available appropriations that plenary review here is necessary.

Contrary to the government's view, in considering a statutory "cap" on available appropriations the Federal Circuit in *Babbitt v. Oglala Sioux Tribal Public Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), never suggested that government contractors operating under "availability" clauses have no rights. The court held only that the government's contractual obligations in such circumstances are limited to the appropriations Congress at the time chooses to make available for the agency to pay them. *Id.* at 1378. Nothing in that decision remotely suggests that once Congress acts, a contractor also bears the risk either that the agency will simply spend down its appropriations on other discretionary activities and leave the contractor with nothing, or that the government years later might declare retroactively that no appropriations were ever

available in the first place. Indeed, the Federal Circuit in *Oglala* noted that the government *is* bound "contractually" once there are legally available funds. *Id.* at 1379-80.

The decision below has even less to do with the D.C. Circuit decision in *Ramah Navajo*. Unlike here, *Ramah Navajo* involved a congressional decision reflected in an appropriations act to limit the agency's contracting funds. 87 F.3d at 1342. There was no suit for damages for unpaid amounts, but only a suit challenging the agency's mishandling of a genuine appropriations shortfall. *Id.* at 1343. Never did the D.C. Circuit even hint that if Interior had, instead, received a lump-sum appropriation, it could still have avoided its obligations to pay the contractors in full. And no other court has ever so held, either under the ISDA or any other contracting regime.

5. The government tries to avoid the conflicts between the decision below and both *Winstar* and the *Red Lion* line of cases by insisting, not that Congress can change contract rights after the fact, but that Congress in Section 314 merely "made its intent" in the earlier appropriations acts "clear," Resp. Br. 20. *See* Pet. 20-21, discussing *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969). In making this bald assertion the government simply ignores that Congress in Section 314 never stated this to be its intent, the provision contains a telling "notwithstanding" clause reflecting a clear intent to alter pre-existing law, there were no lower court conflicts on the meaning of those enactments, and no legislative history exists supporting a mere intent to clarify a perceived ambiguity. All of these are the key missing guideposts for distinguishing a genuine clarification from an outright amendment. Pet. 21-22.

Indeed, as the government points out (Resp. Br. 22), the only relevant history shows that Congress was well aware of the uniform court decisions finding the ISDA and earlier appropriations Acts unambiguous, and finding the government's liability for underpaying contractors equally clear.

See S. Rep. 105-227 (1998), at 51-52 (discussing the importance of "[t]he availability of full CSC funding" to carry out ISDA contracts, the recent "deficiencies in CSC funding," and that "[a]gainst this backdrop, in several cases the Federal courts have held the United States liable for insufficient CSC funding"). Contrary to the government's view, the situation thus could not be more unlike *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999). *See id.* at 1287 (pre-existing "body of law that frequently [was] inconsistent and that provide[d] a vague and nebulous definition"), 1288 (history reflected "effort to retain the same standard of conduct"), 1290 ("drafting history" of original enactment "ambiguous"). Congress knew it was altering the pre-existing law under which the courts had consistently found the government liable for contract underpayments. Just as clearly under *Winstar* and *Red Lion*, that is something Congress cannot do with impunity.[5]

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

---

[5] The government makes a half-hearted and belated suggestion that this case became moot seven years ago, when the relevant appropriations lapsed. Resp. Br. 23. But unlike cases for equitable relief brought under the Administrative Procedure Act, 5 U.S.C. § 702, this is a breach of contract action for "money damages" under the CDA. Resp. Br. 8 (acknowledging same); 25 U.S.C. § 450m-1(a) (authorizing "money damages"), (d) (referencing CDA). *See also* 41 U.S.C. § 605(a) (permitting six years, not the lapse of a contemporaneous appropriation, to submit a CDA claim). By statutory mandate, CDA money judgments are paid out of the Judgment Fund Appropriation created by 31 U.S.C. § 1304(a), an appropriation that under Art. I, § 9, cl. 7 certainly is an "Appropriation[ ] made by Law." *See Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994). For similar reasons, Section 314 is irrelevant too, for it does not even mention the Judgment Fund Appropriation, much less make that appropriation unavailable. Pet. 77a (addressing only appropriations "for the Bureau of Indian Affairs and the Indian Health Service").

Respectfully submitted,

Of Counsel:

CARTER G. PHILLIPS
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

RIYAZ KANJI
KANJI & KATZEN
201 South Main St.
Ann Arbor, MI 48104
(734) 769-5400

* Counsel of Record

LLOYD BENTON MILLER *
HARRY R. SACHSE
ARTHUR LAZARUS, JR., PC
MELANIE B. OSBORNE
NACOLE D. HESLEP
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20007
(202) 682-0240

Counsel for Petitioners

Supreme Court, U.S.
FILED
JUL 16 2003
CLERK

No. 02-1472

IN THE

Supreme Court of the United States

CHEROKEE NATION and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

CARTER G. PHILLIPS
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

RIYAZ KANJI
KANJI & KATZEN, PLLC
201 South Main St.
Ann Arbor, MI 48104
(734) 769-5400

LLOYD BENTON MILLER *
HARRY R. SACHSE
ARTHUR LAZARUS, JR., PC
MELANIE B. OSBORNE
NACOLE D. HESLEP
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1424 K Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for Petitioners

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
CONCLUSION	7
SUPPLEMENTAL APPENDIX	
Opinion of the Court of Appeals for the Federal Circuit in *Thompson v. Cherokee Nation*, __ F.3d ___, 2003 WL 21511710 (Fed. Cir. July 3, 2003)	1a

TABLE OF AUTHORITIES

CASES	Page
Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539 (Ct. Cl. 1980)	4, 5
Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969)	5
Shoshone-Bannock Tribes v. Secretary, 279 F.3d 660 (9th Cir. 2002)	3
Thompson v. Cherokee Nation, ___ F.3d ___, 2003 WL 21511710 (Fed. Cir. July 3, 2003)	*passim*
STATUTES	
25 U.S.C. § 450 *et seq.*	2
25 U.S.C. § 450j-1(b)	
25 U.S.C. § 450m-1(a)	2
25 U.S.C. § 450m-1(d)	2
41 U.S.C. § 601 *et seq.* ("Contract Disputes Act")	2
41 U.S.C. § 606	2
41 U.S.C. § 609	2
Pub. L. 105-277, § 314, 112 Stat. 2681-288 (1998) ("Section 314")	5
RULES	
S. Ct. Rule 15.8	1

IN THE

Supreme Court of the United States

No. 02-1472

CHEROKEE NATION and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA;
TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.8, the Cherokee Nation and Shoshone-Paiute Tribes bring to this Court's attention the recent decision of the United States Court of Appeals for the Federal Circuit—the court of appeals most expert in government contracting matters—in *Thompson v. Cherokee Nation*, __ F.3d ___, 2003 WL 21511710 (Fed. Cir. July 3, 2003), holding the government liable for failing to pay Petitioners' unreimbursed contract support costs. Pet. Supp. App. 1a-31a. In its new decision the Federal Circuit expressly and repeatedly "disagree[s]" with the reasoning and holding of the Tenth Circuit in this case, and thus makes it crystal clear that the Petition should be granted. Express conflicts exist among

the Circuits on issues of extraordinary importance to 329 tribal contractors and many more government contractors doing business with federal agencies under similar contracting statutes.[1]

ARGUMENT

Thompson v. Cherokee Nation is a parallel action to the case here on review, although it arose from the Interior Board of Contract Appeals rather than from a federal district court.[2] In *Thompson* the Federal Circuit considered the government's liability to the Cherokee Nation under the Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.* ("ISDA") for failing to pay out of the relevant FY1994, FY1995 and FY1996 Indian Health Service appropriations the full contract support costs associated with the Cherokee Nation's ISDA contracts in those years. Pet. Supp. App. 10a-11a.

Similarly in the case here on review, the Tenth Circuit considered the government's liability to the Cherokee Nation for failing to pay out of the subsequent FY1997 IHS appropriation the full contract support costs associated with the Cherokee Nation's ISDA contract that year (together with the government's liability to the Shoshone-Paiute Tribes for

[1] In its Opposition the government sought to portray the opinion below as well within the mainstream of government contracting and appropriations law. But as the Tribes' Petition and Reply demonstrated, and as the new Federal Circuit decision now conclusively confirms, that contention is simply untenable.

[2] The Contract Disputes Act, 41 U.S.C. § 601 *et seq.* ("CDA") affords all government contractors the option of either appealing a contracting officer's denial of an administrative claim to a contract appeals board (as occurred in *Thompson*), or instituting an original action in the Court of Claims. 41 U.S.C. §§ 606, 609. Under 25 U.S.C. §§ 450m-1(a) and (d) of the ISDA, the district courts are vested with jurisdiction "concurrent with the United States Court of Claims" to hear such actions involving self-determination contracts with Indian Tribes (which is the election pursued in the case at bar).

failing to pay those Tribes in FY1996 and FY1997). Pet. 7-9. The two cases thus involve the precise same issues under the ISDA; one of the very same appropriations acts; and, all told, four appropriations acts whose pertinent terms are identical. *See also* Pet. Supp. App. 15a-16a n.6 (noting common issues raised among the cases), 19a-20a (noting the appropriations acts' identical language).

In a lengthy and carefully considered opinion, the unanimous Federal Circuit panel in *Thompson* expressly and repeatedly disagrees with the Tenth Circuit (and, where relevant, a Ninth Circuit decision relied upon by the court below, *Shoshone- Bannock Tribes v. Secretary*, 279 F.3d 660 (9th Cir. 2002)). *E.g.*, Pet. Supp. App. 15a ("We find none of the Secretary's arguments persuasive, and disagree with the approaches of the Ninth and Tenth Circuit cases."). The Federal Circuit's adherence to this Court's jurisprudence and well-settled precedent both within and outside that Circuit, and its corresponding rejection of the approach taken by the Tenth Circuit below, is directly pertinent to every issue presented for review in the Tribes' petition.

For instance, the Federal Circuit—disagreeing with the Tenth Circuit below—invokes the time-worn principle that "in the absence of a statutory cap or other explicit statutory restriction, an agency is *required* to reprogram if doing so is necessary to meet debts or obligations," Pet. Supp. App. 14a (emph. in original). On this basis the *Thompson* court rejects the Tenth Circuit's contrary notion that the Secretary had "discretion" not to pay the Cherokee Nation's contract support costs associated with the "ongoing" portions of its contracts:

> We cannot agree [with the Tenth Circuit] that the Secretary had discretion to refuse to reprogram to meet his contractual obligations. As we have discussed above, it is well recognized that if the Secretary has the authority to reprogram and there are funds available in a

> lump-sum appropriation, there are "available funds." Our predecessor court in *Blackhawk* rejected the Secretary's contention to the contrary. 622 F.2d at 547. * * * .
>
> * * *
>
> In short, non-binding recommendations of Congress do not excuse the Secretary from fulfilling his duty under the contracts at issue here to pay full contract support costs. The Secretary did not have the discretion to breach his contracts with the [Cherokee Nation].

Id. 18a-19a (footnotes omitted).

Next, the Federal Circuit reads the words "shall remain available" (the portion of all four Appropriations Acts addressing contract support costs associated with "initial or expanded" ISDA contracts) as a "term of art" that is "not ambiguous" and "is commonly understood as a carryover provision, not a statutory cap," *id.* 22a, explaining:

> The phrase "shall remain available" is a term of art in appropriations legislation that our sister circuits have consistently interpreted, not as a statutory cap on funding to a particular source, but as an authorization of "carryover authority," indicating that unexpended funds "shall remain available" for the same purpose during the succeeding fiscal year. [Case citations omitted] In the present case, there is no indication that the "shall remain available" language constituted anything other than a typical "carryover" provision. It certainly did not constitute a statutory cap excusing the Secretary from fulfilling his obligations under the availability clause of section 450j-1(b).

Id. 22a-23a. Here, again, the Federal Circuit "conclude[s] that the Ninth and Tenth Circuit decisions were incorrect in this respect." *Id.* 22a.

Just as importantly in connection with the lynchpin to the Tenth Circuit decision—the Section 314 rider—the Federal Circuit once again disagrees with the court below, holding that under the Federal Circuit's precedent in *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980), Section 314 could not possibly impair contract rights that had "vested long before the passage of [Section 314]." Pet. Supp. App. 24a. The Federal Circuit also "disagree[s]" that Section 314 merely "clarifies" the earlier Appropriations Acts (as the Tenth Circuit below had reasoned), *id.* 24a-25a, because the earlier Appropriations Acts were perfectly clear and there was thus nothing ambiguous to be clarified:

> [A] later statute cannot be read as clarifying the meaning of an earlier statute where the earlier statute is unambiguous and the later statute is ambiguous. [Case citations omitted] As we have already discussed, in the present case the relevant appropriations acts were not ambiguous and were not in need of clarification. They imposed no cap on available appropriations, either as to ongoing contracts, or as to initial and expanded contracts.

Id. 25a-26a. *See also id.* 25a n.18 (discussing *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367 (1969) and its progeny). Parting company once again with the Tenth Circuit, the new Federal Circuit decision concludes that, "[i]n view of the well-established presumption against retroactivity," *id.* 23a, Section 314 is best read as having prospective effect only. Pet. Supp. App. 26a.

Finally, the Federal Circuit decision sharply contradicts the Tenth Circuit in concluding that the ISDA's "reduction clause" did not excuse the Secretary's failure to pay, noting that the Secretary "admits" that tens of millions of dollars were available annually in fiscal years 1994 through 1996 to be reprogrammed from "'inherently federal functions'" or

from "left-over and unexpended" appropriations remaining "at the end of the relevant fiscal years," *id.* 28a:

> Taken together, the appropriations reserved for "inherently federal functions" and the left-over appropriations were more than sufficient to pay the tribe its full contract support costs. . . . . The funds reserved for "inherently federal functions" and the left-over appropriations were not funds devoted to programs serving other tribes, and the Secretary could have drawn from those funds to meet his obligations without reducing funding for programs serving other tribes.

Id. 29a. *See also* Pet. Reply 7 n.4 (noting similar Secretarial concessions below).

In short, in every possible respect, the Federal Circuit's new decision confirms that the Tenth Circuit decision below is in grave conflict with the law of this Court, the Federal Circuit, and other sister circuits. This, from the Nation's appellate court most familiar with and expert in government contracting matters. The current state of affairs is thus untenable: the very same authorizing act and appropriations acts have now received diametrically opposing interpretations, with deeply disturbing consequences for the stability of government contracts. The destabilizing impact engendered by the decision below affects not only 329 tribal contractors throughout the country—reason enough to grant the writ—but also other government contractors who, in the absence of plenary review and reversal, cannot be assured that the Federal Circuit's approach in *Thompson* is indeed the correct assessment of the government's contracting responsibilities under similar authorizing statutes.

CONCLUSION

For the reasons set forth in the Petition and Reply, and for the additional reasons set forth in this Supplemental Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Of Counsel:

CARTER G. PHILLIPS
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

RIYAZ KANJI
KANJI & KATZEN, PLLC
201 South Main St.
Ann Arbor, MI 48104
(734) 769-5400

LLOYD BENTON MILLER *
HARRY R. SACHSE
ARTHUR LAZARUS, JR., PC
MELANIE B. OSBORNE
NACOLE D. HESLEP
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1424 K Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for petitioners

* Counsel of Record

APPENDICES

APPENDIX

United States Court of Appeals for the Federal Circuit

02-1286

Tommy G. Thompson,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,
Appellee.

DECIDED: July 3, 2003

Before CLEVENGER, SCHALL, and DYK, *Circuit Judges*.

DYK, *Circuit Judge*.

This case raises the question of whether the Secretary of the Department of Health and Human Services ("the Secretary") breached his contracts with the Cherokee Nation of Oklahoma ("the appellee"), entered into pursuant to the Indian Self Determination and Education Assistance Act, 25 U.S.C. §§ 450—450n ("ISDA").

The Department of the Interior Board of Contract Appeals ("the Board") determined that the Secretary breached his contracts for the fiscal years 1994, 1995, and 1996, by failing to pay the full indirect costs of administering federal programs. *In re Cherokee Nation of Okla.*, IBCA Nos. 3877-79, 99-2 B.C.A. (CCH) ¶ 30,462 (Interior B.C.A. 1999) ("*Cherokee I*"); *reconsideration denied*, *In re Cherokee Nation of Okla.*, IBCA Nos. 3877-79, 01-1 B.C.A. (CCH) ¶

31,349 (Interior B.C.A. 2001) ("*Cherokee II*"). By statute, the Secretary's obligation to pay was "subject to the availability of appropriations," and the Secretary was "not required to reduce funding for programs, projects, or activeties serving a tribe" in order to make the payments. 25 U.S.C. § 450j-1(b) (2000).

We hold that there were available appropriations to pay the appellee its full indirect costs, because there were no statutory caps on funding in the appropriations acts for the relevant fiscal years, and that the Secretary has not shown that full payment would require the Secretary "to reduce funding for programs, projects, or activities serving [another] tribe."

We therefore affirm the judgment of the Board.

BACKGROUND

I

Before the enactment of the ISDA in 1975, service programs benefiting the Indian tribes were operated almost exclusively by the federal government. The ISDA was designed to make a major change in this approach. Congress was apparently concerned that:

> the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and it has denied to the Indian people an effective voice in the planning and implementing of programs for the benefit of Indians which are responsive to the needs of the Indian community.

S. Rep. No. 93-762, at 12 (1974).

The ISDA had the stated purpose of "permit[ting] an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful

participation by the Indian people in the planning, conduct, and administration of those programs and services." ISDA, Pub. L. No. 93-638, § 3(b), 88 Stat. 2203, 2204 (1975) (codified as amended at 25 U.S.C. § 450a(b) (2000)). In order to transfer the programs from federal to tribal control, the statute required the Secretary to enter into contracts with the tribes, under which the tribes would administer the previously federal programs. The statute provided, "[t]he Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof." *Id.* § 102(a), 88 Stat. at 2206 (codified as amended at 25 U.S.C. § 450f(a)(1) (2000)).

The statute required that the tribes receive the full amount of federal funds that the programs would have received had the Secretary continued to operate them directly: "The amount of funds provided under the terms of contracts entered into pursuant to sections 102 and 103 shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof." *Id.* § 106(h), 88 Stat. at 2211 (codified as amended at 450j-1(a) (2000)). This amount is often called the "secretarial amount."

By 1987, many tribes were "undertaking their own education, health, and job-training programs." S. Rep. No. 100-274, at 2 (1987). The transition, however, was not without problems. The tribes complained that they were not receiving amounts sufficient to cover the full administrative costs of the programs. *See generally*, *Babbit v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1380-84 (Fed. Cir. 1999) (Gajarsa, J., concurring). One of the reasons for this deficiency apparently was that the "secretarial amount" required to be paid by section 106(h) of the original statute included only the funds that the Secretary would have

provided to operate the programs directly, but did not include additional administrative costs that the tribes incurred in their operation of the programs, which the Secretary would not have directly incurred (for example, the cost of annual financial audits, or the cost of administrative resources that the Secretary could draw from other government agencies). At an oversight hearing, "witnesses explained that the failure of Federal agencies to reimburse tribes for the cost of program operation has resulted in a tremendous drain on tribal financial resources." S. Rep. No. 100-274, at 7 (1987). The committee concluded that:

> [p]erhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts. The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. Tribal funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility. *It must be emphasized that tribes are operating federal programs and carrying out federal responsebilities when they operate self-determination contracts. Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs.*

Id. at 8-9 (emphasis added).

Partly in response to this problem, Congress passed the Indian Self-Determination Amendments of 1988, Pub. Law.

No. 100-472, 102 Stat. 2285 (codified as amended at 25 U.S.C. §§ 450—450n (2000)) (1988), which required that the Secretary provide funds for the full administrative costs to the tribes. The amended statute provides, "[t]here *shall be added* to the [secretarial amount] contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 450j-1(a)(2) (2000) (emphasis added).[1] The statute also provides, "[t]he amount of funds required by subsection (a) of this section— (1) *shall not be reduced* to make funding available for contract monitoring or administration by the Secretary," and "(3) *shall not be reduced* by the Secretary to pay for Federal functions." *Id.* § 450j-1(b) (emphases added). The committee explained, "[a] new section 106 is added to the Act to clarify provisions for funding self-determination contracts, including indirect costs. This section protects contract funding levels provided to tribes, and prevents the diversion of tribal contract funds to pay for costs incurred by the Federal government." S. Rep. No. 100-274, at 30.

Under the amended statute, there are only narrow exceptions to this obligation of the government to pay full contract support costs. One of these exceptions states that "[n]otwithstanding any other provision in this subchapter, the

---

[1] "Contract support costs" are defined as:

> an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—
>
> (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
>
> (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

25 U.S.C. § 450j-1(a)(2) (2000).

provision of funds under this subchapter is subject to the availability of appropriations." 25 U.S.C. § 451j-1(b) (2000) ("availability clause"). Another exception provides that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization." *Id.*

II

Beginning in 1983, the appellee, the Cherokee Nation of Oklahoma, entered into contracts with the Secretary under the ISDA, to operate hospitals, health clinics, dental services, mental health programs, and alcohol and substance abuse programs, all of which were formerly operated by the Secretary. This case concerns indirect costs under the contracts for fiscal years 1994, 1995, and 1996. Indirect costs are "administrative or other expense[s] related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program." 25 U.S.C. § 450j-1(a)(3)(ii) (2000).

On June 30, 1993, the appellee and the Secretary agreed to a "Compact of Self-Governance" pursuant to the ISDA, Title III—Tribal Self-Governance Demonstration Project. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, §§ 301-306, 102 Stat. 2285, 2296-98. The ISDA requires that every self-determination contract incorporate the terms of a model agreement, which is provided by 25 U.S.C. § § 450l(c). The compact at issue here incorporated all of the terms of this model agreement. The compact provided that the appellee and the Secretary would negotiate annual funding agreements, which would be treated as incorporated into the compact. Indirect costs were negotiated pursuant to Office of Management and Budget Circular A-87 as a predetermined

fixed percentage of the base funding for the health programs.[2] The direct funding for the contract for those years was: $18,377,612 for 1994, $24,332,802 for 1995, and $24,681,697 for 1996. The negotiated rates to determine indirect costs were: 14.3% for fiscal year 1994; 17.1% for fiscal year 1995; and 12.2% for fiscal year 1996.

The compact required the Secretary to pay the full amount of funds negotiated in the annual funding agreements, subject only to the narrow exceptions provided by section 450j-1(b) and to any specific directives in applicable appropriations acts:

> Subject only to the appropriation of funds by the Congress of the United States, and to adjustments pursuant to [25 U.S.C. § 450j-1(b)] the Secretary shall provide to the Nation the total amount of funds specified in the Annual Funding Agreement incorporated by reference in Article V, Section 1 . . . . [T]he use of any and all funds under this Compact shall be subject to specific directives or limitations as may be included in applicable appropriations acts.

(J.A. 73.) The Secretary did not pay the required amounts in full. The dispute here concerns the meaning of the section

---

[2] Office of Management and Budget Circular A-87 provides, in pertinent part:

> A predetermined fixed rate for computing indirect costs applicable to a grant may be negotiated annually in situations where the cost experience and other pertinent facts available are deemed sufficient to enable the contracting parties to reach an informed judgment (1) as to the probable level of indirect costs in the grantee department during the period to be covered by the negotiated rate, and (2) that the amount allowable under the predetermined rate would not exceed actual indirect cost.

Principles for Determining Costs Applicable to Grants and Contracts With States, Local, and Federally Recognized Indian Tribal Governments, 46 Fed. Reg. 9548, 9550 (Jan. 28, 1981).

450j-1(b) limitations, and whether they justified the Secretary's nonpayment.[3]

III

On September 27, 1996, the appellee submitted a claim to the contracting officer under the Contract Disputes Act, 41 U.S.C. §§ 601-613, alleging that the Secretary had not paid the full indirect costs to which it was entitled for fiscal years 1994, 1995, and 1996. The appellee claimed that it was owed $1,769,148 for 1994, $2,794,595 for 1995, and $1,805,266 for 1996, for a total claim of $6,369,009. On October 31, 1997, in a final decision, the contracting officer denied the claim.

On January 27, 1998, the appellee appealed from the contracting officer's decision, alleging that the Secretary's failure to pay the full indirect costs constituted a breach of contract and a violation of the ISDA, and seeking damages in the amount of $7,040,358.52. (The reason for the increase in the claimed amount is unclear.)

On December 31, 1998, the Secretary moved to dismiss the appeal. The Secretary argued that under 25 U.S.C. § 450j-1(b), he was not obligated to pay full contract support costs. The Secretary urged that there was a lack of "available funds" under the 1994, 1995, and 1996, appropriations acts. The Secretary's sole argument in this respect was that there were specific recommendations of funding amounts for contract support costs in the appropriations committee reports, and that section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-

[3] Because in the Secretary's view there were insufficient available appropriations to pay the tribes their full contract support costs, the Secretary implemented an allocation policy, whereby unpaid tribes were placed in a queue and aid from future appropriations according to the date of each tribe's individual request. Indian Health Service Circular No. 96-04 (Apr. 12, 1996).

277, § 314, 112 Stat. 2681, 2681-288 (1998) ("section 314"), made those committee report recommendations retroactively binding. The Secretary argued that "Section 314 establishe[d] the 'total amounts' available for [contract support costs]" were the amounts recommended in committee reports, Secretary's Motion to Dismiss, at 8 (Dec. 31, 1998), and that "section 314 ha[d] the retroactive effect of extinguishing Cherokee's . . . claims." *Cherokee I*, 99-2 B.C.A. (CCH) at 150,494.

On June 30, 1999, the Board granted summary judgment of entitlement to the claims in favor of the appellee. *Id.* at 150,495. The Board held that there was no clear indication that Congress intended section 314 of the 1999 appropriations act to modify or repeal the Secretary's obligation to provide full indirect contract support costs under the ISDA or to authorize the Secretary to abrogate his past existing contractual obligations. The Board directed the parties to reach an agreement on quantum for the breach of contract within 60 days. *Id.*[4]

On March 27, 2000, the Secretary moved for reconsideration of the Board's decision. The Secretary argued that our court's decision in *Oglala Sioux*, which issued after the Board's initial decision, required reconsideration of the Board's grant of summary judgment. In *Oglala Sioux*, we held that language in the 1995 appropriations act funding the Bureau of Indian Affairs—stating that "not to exceed $95,823,000 shall be for payments . . . for contract support costs"—constituted a statutory cap on appropriations that excused the agency from paying full contract support costs under the availability clause of section 450j-1(b). 194 F.3d at 1376, 1378. The Secretary admitted before the Board that,

[4] The Secretary appealed the Board's decision to this court, but we dismissed the appeal, holding that the Board's order was not final. *Sec'y of Health & Human Servs. v. Cherokee Nation of Okla.*, No. 00-1056 (Fed. Cir. Feb. 25, 2000).

unlike *Oglala Sioux*, "[t]his case does not involve a statutory cap on appropriations, and, at first glance, the lump sum appropriations . . . may appear more than adequate to make full payment." Appellee's Motion for Leave to Move for Reconsideration, at 10 (Mar. 27, 2000). However, the Secretary now argued that by virtue of section 450j-1(b), he was not required to pay full contract support costs because doing so would require a reduction of funds for programs serving other tribes. The Secretary argued that there was at least a dispute of material fact on this issue that precluded summary judgment.

On March 21, 2001, the Board denied rehearing. *Cherokee II*, 01-1 B.C.A. (CCH) at 154,801. The Board held that, unlike *Oglala Sioux*, there were no statutory caps on available appropriations for contract support costs, and that earmarks in committee reports were not binding on the Secretary. The Board also held that the Secretary "ha[d] provided neither adequate nor convincing proof in this case that any actual reduction of funds for other tribes would be required to fully fund [the appellee's contract support costs]." *Id.* at 154,800. The Board, therefore, reaffirmed its grant of summary judgment for the appellee on the issue of entitlement.

On November 15, 2001, the Board accepted the parties' joint stipulation on quantum and ordered damages in favor of the appellee in the amount of $8,500,000.

The Secretary timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(10). We review the grant of summary judgment without deference. *Oglala Sioux*, 194 F.3d at 1377.

DISCUSSION

I

The question is whether the Secretary breached his funding agreements with the appellee for the fiscal years 1994, 1995,

and 1996, by failing to pay full indirect contract support costs. This issue does not come to us on a blank slate. Several fundamental principles of appropriations law, as enunciated by the Supreme Court, by this court, by our predecessor court, and by other circuits are relevant to this case. These decisions have relied on the opinions of the General Accounting Office ("GAO"), as expressed in *Principles of Federal Appropriations Law* ("*GAO Redbook*"), and on the opinions of the Comptroller General, both of whose opinions, while not binding, are "expert opinion[s], which we should prudently consider." *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984); *see also Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (relying on *GAO Redbook* at 6-159); *Assoc. of Civilian Technicians v. Fed. Labor Relations Auth.*, 269 F.3d 1112, 1116 (D.C. Cir. 2001).

The first principle is that, if there is a statutory restriction on available appropriations for a program, either in the relevant appropriations act or in a separate statute, the agency is not free to increase funding for that program beyond that limit. *Oglala Sioux*, 194 F.3d at 1376, 1378. In *Oglala Sioux* we found such a restriction in the appropriations act itself. *Id.* In *Sutton v. United States*, 256 U.S. 575 (1921), the Supreme Court found that language in a separate statute imposed a statutory cap on appropriations when the separate statute provided that "no contract 'for any public improvement . . . shall bind the Government to pay a larger sum of money than the amount in the Treasury appointed for the specific purpose.'" *Id.* at 578.

The second principle is that Congress generally uses standard phrases to impose a statutory cap. *GAO Redbook* at 6-4 ("[C]ertain forms of appropriation language have become standard."). The most common language in appropriations acts provides that funds allocated to a specific program are "not to exceed" a particular amount. *See, e.g., Oglala Sioux*, 194 F.3d at 1376, 1378; *Nat'l Ass'n of Reg'l Councils v.*

Costle, 564 F.2d 583, 587 (D.C. Cir. 1977) (interpreting "not to exceed" appropriations language as placing a statutory cap on appropriations); *Appropriations—Restrictions—Prohibition Clause*, 64 Comp. Gen. 263, 264 (1985) (interpreting "not to exceed $15,000" as "susceptible of but one meaning which is that the [agency] may not expend more than $15,000"); *see also GAO Redbook* at 6-5 to 6-8 ("[T]he most effective way to establish a maximum (but not minimum) earmark is by the words 'not to exceed' or 'not more than.' . . . These are all phrases with well-settled plain meanings.").

The third established principle of appropriations law is that in order for a statutory cap to be binding on an agency, it must be carried into the legislation itself; such a cap cannot be imposed by statements in committee reports or other legislative history. As the Supreme Court noted in *Lincoln*:

> a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and *indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency*.

508 U.S. at 192 (emphasis added) (citations omitted). To be sure, legislative history can be used as an interpretive guide to determine whether language in an appropriations act constitutes a statutory cap. *United States v. Dickerson*, 310 U.S. 554, 561 (1940). However, legislative history itself is not binding on an agency and does not "ha[ve] the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating." *Am. Hosp. Ass'n v. Nat'l Labor Relations Bd.*, 499 U.S. 606, 616 (1990), *quoted in Lincoln*, 508 U.S. at 192. Our predecessor court in *Blackhawk Heating & Plumbing Co. v. United States*, 622

F.2d 539 (Ct. Cl. 1980) specifically held that statements in committee reports and at hearings expressing disapproval of the agency's reprogramming did not constitute statutory caps on available appropriations. *Id.* at 544-46.

The fourth principle is that when there is a lump-sum appropriation without a statutory cap, an agency is free to reprogram funds from that appropriation from one activity to another. The GAO defines "reprogramming [as] the utilization of funds in an appropriation account for purposes other than those contemplated at the time of appropriation. In other words, it is the shifting of funds from one object to another *within* an appropriation." *GAO Redbook* at 2-25 (emphasis in original). "The authority to reprogram is implicit in an agency's responsibility to manage its funds; no statutory authority is necessary." *Id.*; *see also LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975). Hence, unless there is a specific "statutory cap" on the use of lump-sum appropriations, or a specific restriction in other legislation, an agency is not restricted in its ability to reprogram.

This view of the scope of the reprogramming authority was confirmed by the Supreme Court in *Lincoln*. 508 U.S. at 192. In *Lincoln*, the Indian Health Service redirected funding for a program that had previously been funded out of its lump-sum appropriation. The tribe contended that the Indian Health Service was obligated to continue to fund the program from lump-sum appropriations in later years. The Court disagreed, holding that, because the appropriations legislation merely provided a lump-sum appropriation without further restriction, the agency was free to reprogram funds. *Id.* at 192 (citing *GAO Redbook* at 6-159). The Court based its conclusion on "a fundamental principle of appropriations law . . . that where 'Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions.'" *Id.* at 192 (*quoting LTV*

Aerospace Corp., 55 Comp. Gen. at 319). Our predecessor court also recognized this principle in *Blackhawk*, in which we stated:

> the budget estimates presented to the Congress, and on the bases of which a lump-sum appropriation is subsequently enacted, are not binding on the administrative officers unless those items (and their amounts) are carried into the language of the appropriations act itself, see 17 Comp. Gen. 147, 150 (1937), or . . . there exists a statute that places a general and continuing restriction upon any agency's right to shift funds within an appropriation account.

622 F.2d at 547 n.6.

The final relevant principle of appropriations law is that, in the absence of a statutory cap or other explicit statutory restriction, an agency is *required* to reprogram if doing so is necessary to meet debts or obligations. In other words, "[i]n some situations, the agency's discretion may rise to the level of a duty." *GAO Redbook* at 2-26. This was the holding of the court in *Blackhawk*. 622 F.2d at 553. In *Blackhawk*, the agency defended its failure to pay fully under the terms of a settlement agreement by pointing to a provision of the agreement that the agency's liability was "contingent upon the availability of appropriated funds from which payment in full can be made." *Id.* Because there was no statutory restriction on the reprogramming authority with respect to past due obligations, our predecessor court held that the agency was obligated to make the payments and was liable for breach of contract when it declined to do so. *Id.* at 553; *see also* H.R. Rep. No. 105-609 at 57 (1998) ("Without a ceiling on contract support, the Bureau [of Indian Affairs] could be required to reprogram from other tribal programs in

the Operation of Indian Programs to fund 100 percent of tribal contract support costs.").[5]

II

Against these principles, we consider the Secretary's core argument that he was excused from fulfilling his contract obligations in the present case by the availability clause of 25 U.S.C. § 450j-1(b). That clause provides that "[n]otwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations." 25 U.S.C. § 450j-1(b) (2000).

The Secretary's various arguments under this clause are confusing and contradictory, and depart from arguments the Secretary made before the Board and in similar litigation in the Ninth and Tenth circuits. Nonetheless, in nearly identical litigation in the Ninth and Tenth Circuits involving the same statutory language, the Secretary prevailed. *Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054, 1066 (10th Cir. 2002); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Dep't of Health & Human Servs.*, 279 F.3d 660, 668 (9th Cir. 2002). The Ninth and Tenth circuits held that the Secretary was excused by the availability clause of section 450j-1(b) from fulfilling his contractual obligation to pay full contract support costs. We find none of the Secretary's arguments persuasive, and disagree with the approaches of the Ninth and Tenth Circuit cases.[6]

---

[5] We reject the government's attempt to distinguish *Blackhawk* on the basis that *Blackhawk* involved the interpretation of a standard procurement contract, rather than a contract under the ISDA. There is nothing in the ISDA to support the contention that the Secretary has wider latitude to breach his contracts with the Indian tribes than he has with other government contractors.

[6] Those cases involved the Shoshone-Bannock Tribe's operation of healthcare programs during fiscal year 1996, the Shoshone-Paiute's operation of healthcare programs during fiscal years 1996 and 1997, and the Cherokee Nation Tribes of the Duck Valley Reservation's operation of

We consider separately the Secretary's obligations with respect to "ongoing contracts" and "initial and expanded contracts." "Ongoing contracts" are contracts that continue from fiscal years before the relevant appropriations act, while "initial and expanded contracts" are those that begin during the fiscal year of the relevant appropriations act. *See* Indian Health Service Circular No. 96-04, at 10, 13, available at http://www.ihs.gov/publicinfo/publications/ihsmanual/Circulars/Circ96/9604.pdf.[7]

A. Ongoing Contracts

There is no argument that there was an explicit statutory cap in the appropriations acts for ongoing contracts. However, in various appropriations committee reports, the Senate Appropriations Committee and the House Appropriations Committee recommended particular funding levels for contract support costs for both ongoing and initial and expanded contracts. For example, the House Report on the 1996 appropriations act stated, "[t]he Committee recommends $153,040,000 for contract support." H.R. Rep. No. 104-173, at 97 (1995). The amount contemplated for ongoing contracts can be deduced by deducting the amount recommended for initial and expanded contracts—in this case, $7,500,000. *Id.* Thus, the total contemplated by the House Committee for ongoing contracts in 1996, was $145,540,000. As discussed above, the Supreme Court's decision in *Lincoln*, our predecessor court's decision in *Blackhawk*, and other cases establish that such committee

healthcare programs during fiscal year 1997. *Shoshone-Bannock*, 279 F.3d at 668; *Cherokee*, 311 F.3d at 1066.

[7] The status of the contracts at issue here is somewhat unclear. The parties dispute whether some of the programs the appellee operates were "ongoing" or "initial and expanded." (*Compare* Appellant's Br. at 18, *with* Appellee's Br. at 21 n.42.) Because we conclude that there was no statutory cap on appropriations for either type of program, we need not decide this issue.

report language as such is not binding on the Secretary. *Lincoln*, 508 U.S. at 192; *Blackhawk*, 622 F.2d at 547 n.6; *see also Am. Hosp. Ass'n*, 499 U.S. at 616 (holding that statements in committee reports were not binding on the agency and do not "ha[ve] the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating").[8]

The Secretary accepts this principle, but argues that he had discretion to determine the amount of "available appropriations" for ongoing contracts and that this discretion was appropriately guided by the recommendations in committee reports. The Tenth Circuit agreed, holding:

> in accordance with the appropriation committee report recommendations, the [Secretary] allocated to area offices for tribal contract [support costs] $153,040,000 in 1996 and $160,660,000 in 1997. . . . [W]hile the Tribes correctly argue that the earmark recommendations of a committee are not typically legally binding, the [Secretary] is likewise not obligated to completely ignore them. Nothing suggests that the [Secretary] awarded the amount it did for ongoing program [contract support costs] because it felt *legally* obligated to do so because of the committee report recommendations, as opposed to *making that allocation as an exercise of the limited discretion inevitably vested in it.* In sum, we agree with the district court that funding for the Tribes' ongoing [contract support costs] was subject to the availability of appropriations from Congress, and there

[8] Significantly, the ISDA, in one very limited respect, did make Committee Report language binding, stating that "[t]he amount of funds required by subsection (a) of this section . . . (2) shall not be reduced by the Secretary in subsequent years except pursuant to . . . (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution." 25 U.S.C. § 450j-1(b) (2000).

were insufficient appropriations to fully pay those [contract support costs].

Cherokee, 311 F.3d at 1062-63 (first emphasis in original) (second emphasis added) (internal citations omitted).[9]

We cannot agree that the Secretary had discretion to refuse to reprogram to meet his contractual obligations. As we have discussed above, it is well recognized that if the Secretary has the authority to reprogram and there are funds available in a lump-sum appropriation, there are "available funds." Our predecessor court in *Blackhawk* rejected the Secretary's contention to the contrary. 622 F.2d at 547. In *Blackhawk*, the government refused to reprogram to meet its obligations under a settlement agreement, because members of Congress had expressed their disapproval of the reprogramming procedure in committee reports and during hearings. *Id.* at 544-46. Our predecessor court held that statements of Congress that were not enacted into legislation, "can have no bearing upon the parties' rights and obligations under the settlement agreement." *Id.* at 552.

Indeed, allowing the Secretary such discretion would be directly contrary to the purpose of the 1988 Amendments. The primary purpose of section 205 was to remedy "[t]he consistent failure of federal agencies to fully fund tribal indirect costs." S. Rep. No. 100-274, at 8-9. Under the Secretary's approach, section 205 of the 1989 amendments would be rendered a nullity. *See Holloway v. United States*, 526 U.S. 1, 9 (1999) (rejecting a statutory construction that

[9] In the Ninth Circuit, the parties agreed that only the transitional costs of new and expanded contracts were at issue. *Shoshone-Bannock*, 279 F.3d at 666. Thus, funding for ongoing contracts was not addressed in that case.

"would exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit").[10]

In short, non-binding recommendations of Congress do not excuse the Secretary from fulfilling his duty under the contracts at issue here to pay full contract support costs. The Secretary did not have the discretion to breach his contracts with the appellee.[11]

B. Initial and Expanded Contracts

The Secretary appears to argue, however, that even if there were available funds with regard to ongoing contracts, there was a statutory cap on "initial or expanded contracts," which limited the amount of available funds for initial and expanded contracts and excused the Secretary's duty to pay full contract support costs for those contracts. The appropriations acts at issue here all grant a lump-sum appropriation to the Indian Health Service and do not include "not to exceed" language. But these acts do include a provision stating that, "of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1321-189 (1996); *see also* Department of the

[10] Significantly, in *Ramah Navajo School Board, Inc. v. Babbit*, the District of Columbia Circuit also rejected the Secretary's argument that he had "nearly limitless discretion" under the ISDA to pay less than the full amount of contract support costs that were made available in the relevant appropriations acts. 87 F.3d 1338, 1345 (D.C. Cir. 1996). After analyzing the text and legislative history of the ISDA, the court in *Ramah Navajo* held that "Congress left the Secretary with as little discretion as feasible in the allocation of [contract support costs]" and that "there is overwhelming evidence that Congress intended the ISDA to limit the Secretary's discretion in funding matters." *Id.* at 1344, 1347.

[11] This holding with respect to the Secretary's lack of discretion applies to initial and expanded contracts as well as ongoing contracts.

Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2528 (1994); Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993).[12] Initially, it appeared that the Secretary had abandoned the argument that the "shall remain available" language constituted a statutory cap. In his brief, the Secretary conceded that "[u]nlike the [Bureau of Indian Affairs], [the Indian Health Service's] annual appropriation acts did not place such a cap." (Appellant's Br. at 33.) The Secretary made the further concession that "[i]n order to be a statutory 'cap,' the language would have to read that 'not to exceed' $7.5 million was available for new [contract support costs], rather than that $7.5 million 'shall remain available.'" (Appellant's Br. at 33, n.17 (citing *Ramah Navajo Sch. Bd.* 87 F.3d at 1342)). At oral argument, the Secretary presented directly inconsistent theories, at one and the same time reiterating the concessions in his brief,[13] and then arguing that there was an

[12] The parties apparently do not dispute that this $7.5 million was spent during the relevant fiscal years and was insufficient to pay all contract support costs.

[13] The following exchange occurred at oral argument:

> THE COURT: Do I understand that the [Secretary] concedes that there's no legal restriction on [the Secretary] using reprogramming authority to spend more funds for the support costs than it elected to do?
>
> COUNSEL FOR THE SECRETARY: Well, our position is that under the statutory language as it existed, there's, in the appropriations language, there was no statutory cap as that term of art is used.

explicit statutory cap.[14] We treat the Secretary as making this argument, but conclude that the appropriations legislation did not impose a statutory cap as to initial or ongoing contracts.

In the Ninth and Tenth Circuits, the Secretary argued that the "shall remain available" language was ambiguous, and that committee reports should be consulted to resolve the ambiguity. Those courts agreed. In *Shoshone Babbock*, the court found, "[t]he appropriation language is arguably ambiguous. The language, $7.5 million 'shall remain available until expended' is not an unambiguous cap, as was the 'of which not to exceed' language of [the 1995 appropriations provision at issue in *Oglala Sioux*]." 279 F.3d at 666. The court held, however, that the committee report of the House Appropriations Committee helped to resolve this ambiguity in favor of finding a limitation. The committee report stated, "[t]he Committee has provided $7,500,000 for the Indian Self Determination Fund. These funds are to be used for new and expanded contracts." H.R. Rep. No. 104-173, at 97. The court held that "[t]his Committee Report language lends itself to the . . . reading[ ] that only $7.5 million is available." *Shoshone Babbock*, 279 F.3d at 666. In *Cherokee*, the Tenth Circuit agreed with the Ninth Circuit's reasoning in *Shoshone Babbock* and with the Ninth Circuit's conclusion that there was a $7.5 million cap on contract support costs for new and expanded contracts. 311 F.3d at 1063-64. In *Cherokee*, the Tenth Circuit held, "to the extent

[14] The following exchange occurred at oral argument:

> THE COURT: Are you arguing that there's a cap or not a cap? I'm confused. I thought you began the argument by saying there wasn't a cap?
>
> COUNSEL FOR THE SECRETARY: I'm sorry that I confused the court because our position is that what in effect happened was that Congress clarified it and intended it to be a cap. THE COURT: Is there a cap or isn't there a cap? Is there a statutory cap?
>
> COUNSEL FOR THE SECRETARY: Yes.

there is any indicia of Congressional intent . . . in the appropriations committee report . . . it supports the conclusion that Congress intended the $7.5 million to be the maximum [for new and expanded contracts]." *Id.* at 1065 n.10.

We conclude that the Ninth and Tenth Circuit decisions were incorrect in this respect. We recognize that where appropriations acts are ambiguous, legislative history can be relied upon to resolve that ambiguity. *See Dickerson*, 310 U.S. at 561. However, the "shall remain available" language was not ambiguous. Such language is commonly understood as a carryover provision, not a statutory cap. The phrase "shall remain available" is a term of art in appropriations legislation that our sister circuits have consistently interpreted, not as a statutory cap on funding to a particular source, but as an authorization of "carryover authority," indicating that unexpended funds "shall remain available" for the same purpose during the succeeding fiscal year. *See, e.g., Mass. Dep't of Educ. v. United States Dep't of Educ.*, 837 F.2d 536, 538-39 (1st Cir. 1988) (interpreting "shall remain available" language in 20 U.S.C. § 1225(b)(1) as preserving unexpended funds to state agencies for obligation and expenditure during the succeeding fiscal year); *Wilson v. Watt*, 703 F.2d 395, 400 (9th Cir. 1983) (holding that because the relevant appropriations act provided that unexpended funds "shall remain available," plaintiffs could demonstrate that Congress intended unexpended funds to be used for the same purpose in the succeeding fiscal year); *Nat'l Ass'n of Reg'l Councils*, 564 F.2d at 589 n.12 (distinguishing "shall remain available" language from "not to exceed" language and finding that the former does not impose a statutory cap, but is typically used to "carryover" unexpended funds to the succeeding fiscal year). In the present case, there is no indication that the "shall remain available" language constituted anything other than a typical "carryover" provision. It certainly did not constitute a statutory cap

excusing the Secretary from fulfilling his obligations under the availability clause of section 450j-1(b).[15]

C. Section 314

The Secretary additionally argues that section 314 of the 1999 appropriations act leads to a different result, both with respect to ongoing and initial contracts. Section 314 provided, in relevant part, as follows:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs . . . are the total amounts available for fiscal years 1994 through 1998 for such purposes . . . .

Pub. L. No. 105-277, 112 Stat. at 2681-288. In view of the well-established presumption against retroactivity, the Secretary does not directly argue that section 314 retroactively limits the amount of funds available in the earlier years.[16]

Nor could the Secretary so argue. Our predecessor court's decision in *Blackhawk* is directly on point. There, the court concluded that a statute enacted by Congress limiting the amount of settlements could not abrogate the contractor's right to payments that were due before the passage of the statute. *Blackhawk*, 622 F.2d at 552; *see also N.Y. Airways,*

---

[15] Because we conclude that the "shall remain available" language was not ambiguous, we need not address what role, if any, the Indian canon of statutory construction, *Chickasaw Nation v. United States*, 534 U.S. 84, 93-94 (2001), or the *Chevron* doctrine, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984), would have here.

[16] *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 309, 311 (1994); *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 716 (1974); *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 282 (1969).

Inc. v. United States, 369 F.2d 743, 750 (Ct. Cl. 1966) ("[A] pure limitation on an appropriation bill does not have the effect of either repealing or even suspending an existing statutory obligation.") (quoting *Gibney v. United States*, 114 Ct. Cl. 38, 50-51 (1949)). In the present case, the appellee's right to the contract support costs vested long before the passage of the 1999 appropriations act. The relevant appropriations acts provided that "funds made available to tribes and tribal organizations through contracts . . . shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation." Pub. L. No. 103-138, 107 Stat. at 1408; *see also* Pub. L. No. 103-332, 108 Stat. at 2528; Pub. L. No. 104-134, 110 Stat. at 1321-189.[17]

The Secretary, nonetheless, argues that section 314 acts as an interpretive guide that clarifies Congress's intent to limit available appropriations under the ISDA to amounts earmarked in committee reports. (Appellant's Br. at 44, 51.) Again, the Ninth and Tenth Circuits agreed with this argument. In *Cherokee*, the Tenth Circuit held as follows:

> The government argues we need not consider § 314 as a retroactive law; rather, it simply clarifies what Congress meant in enacting the 1996 and 1997 Appropriations Acts. . . . Whether we view [section 314] as a retroactive law, or as merely a clarification of the prior Appropriations Acts, Congress could not have been clearer as to its intent that the Act have a retroactive effect. . . . We therefore agree with the district court that § 314 supports its conclusion that Congress intended to make available for [contract support costs] for new and

[17] However, *Blackhawk* holds that a restriction in later appropriations legislation is effective to eliminate the obligation to make a payment due after the passage of the restriction. 622 F.2d at 552. Here, the payments were due before the enactment of section 314. Thus, we need not decide whether that aspect of *Blackhawk* survives the decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

> expanded contracts in fiscal years 1996 and 1997 *only* $7.5 million. Further, it indicated that the earmarked amounts in the committee reports for ongoing [contract support costs] were intended to be legally binding.

311 F.3d at 1065 (emphasis in original); *see also Shoshone-Bannock*, 279 F.3d at 666. We again disagree.

There appears to be some confusion as to the role of later statutes in interpreting earlier ones.[18] We need not in this case broadly address or resolve this conflict, because there appears to be general agreement that a later statute cannot be read as clarifying the meaning of an earlier statute where the earlier statute is unambiguous and the later statute is ambiguous. *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) ("[T]he views of subsequent Congresses cannot override the unmistakable intent of the enacting one . . . ."); *Piamba Cortes*, 177 F.3d at 1283-84; *Beverly Cmty. Hosp. Ass'n*, 132 F.3d at 1266. As we have already discussed, in the present case the relevant

[18] *Compare O'Gilvie v. United States*, 519 U.S. 79, 90 (1996) ("[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute."), *and United States v. Price*, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."), *with Bell v. New Jersey*, 461 U.S. 773, 784 (1983) ("Of course, the view of a later Congress does not establish definitely the meaning of an earlier enactment, but it does have persuasive value."); *Red Lion Broad. Co. v. Fed. Communications Comm'n*, 395 U.S. 367, 380-81 (1968) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."); *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283-84 (11th Cir. 1999) (holding that in some circumstances a statute can be read to clarify an earlier ambiguous statute, such that "concerns about retroactive application are not implicated"), *and Beverly Cmty. Hosp. Ass'n v. Belshe*, 132 F.3d 1259, 1264-65 (9th Cir. 1997) ("[C]ongressional legislation that thus expresses the intent of an earlier statute must be accorded great weight" in interpreting the earlier statute, even where the later statute's "retroactive application would pose a series of potential constitutional problems.").

appropriations acts were not ambiguous and were not in need of clarification. They imposed no cap on available appropriations, either as to ongoing contracts, or as to initial and expanded contracts.

We also agree with the Board that section 314 was not unambiguously intended to clarify the meaning of the prior appropriations acts. As the Board found, section 314 is easily susceptible to an interpretation that Congress was merely prohibiting the *future* obligation of unspent appropriated funds, rather than clarifying that the earlier statutes imposed a statutory cap. *See Cherokee I*, 99-2 B.C.A. (CCH) at 150,494. Under these circumstances, section 314 cannot work a supposed clarification of the earlier appropriations acts.

The Secretary offers two final arguments with respect to the effect of section 314. The Secretary argues that the claim for damages is moot, because the case was filed after the close of the relevant fiscal years, and section 314 barred payment after the close of the fiscal years. The issue in this case under the availability clause, however, is whether funds *were* available for the Secretary to meet his contract obligations, not whether those funds *remain available* now. The courts have long entertained breach of contract claims against the government filed after the relevant fiscal years have expired. In such a case, damages are awarded from the judgment fund created by 31 U.S.C. § 1304. *Lee v. United States*, 129 F.3d 1482, 1484 (Fed. Cir. 1997).

Somewhat inconsistently with his concession that section 314 is not retroactive, the Secretary argues that section 314 retroactively extinguished appellee's right to full contract support costs and thus barred an award of damages from the judgment fund. In *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), the Supreme Court held that "funds may be paid out [of the judgment fund] only on the basis of a judgment based on a substantive right to

compensation based on the express terms of a specific statute." *Id.* at 432. The Secretary urges that in light of section 314, there is no longer a "right to those payments under the terms of a specific statute within the meaning of *Richmond*." (Appellant's Br. at 54.) We have already concluded, however, that section 314 did not impose a retroactive cap on available appropriations and did not extinguish the appellee's substantive right to full contract support costs under the express terms of the ISDA. Damages for breach of contract may be awarded out of the Judgment Fund when payment is not otherwise provided for. *Lee*, 129 F.3d at 1484.

In summary, because there were no statutory caps on available appropriations, the Secretary was not excused from meeting his contractual obligations by the availability clause of section 450j-1(b).

III

The Secretary argues alternatively that he was excused from performing his contract obligations by the clause in section 450j-1(b) providing that, "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." 25 U.S.C. § 450j-1(b) (2000). The parties disagree as to the meaning of this clause. The tribe urges that the only funds restricted by this provision are those funds specifically appropriated by Congress for other tribal purposes. (Appellee's Br. at 51.) The Secretary argues that the restriction applies as well to funds that the Secretary in his discretion has allocated to other tribal programs. (Appellant's Br. at 36-38.) We need not resolve this dispute, for even adopting the Secretary's construction, there are substantial funds that were not so restricted.

After oral argument in this case, we twice ordered supplemental briefing, in order to seek clarification from the Secretary as to how much of the lump-sum appropriations were obligated to programs serving other tribes for purposes of section 450j-1(b). The Secretary's filings were unresponsive. We need not decide, however, precisely how much money was obligated to "funding for programs, projects, or activities serving [another] tribe" and, therefore, unavailable for contract support costs, because the Secretary identified two categories of funds that clearly do not fall under this restriction: moneys reserved for "inherently federal functions" and moneys that were left-over and unexpended at the end of the relevant fiscal years. These amounts were more than sufficient during the relevant fiscal years for the Secretary to pay full contract support costs to the tribe, and the Secretary would not, therefore, have been forced to reduce funding for programs serving other tribes in order to meet his obligations.

In fiscal years 1994, 1995, and 1996, Congress's total lump-sum appropriations for Indian Health Services were $1,645,877,000, Pub. L. No. 103-138, 107 Stat. at 1408, $1,713,052,000, Pub. L. No. 103-332, 108 Stat. at 2528, and $1,747,842,000, Pub. L. No. 104-134, 110 Stat. at 1321-189. Out of these lump-sum appropriations, Congress specifically obligated particular amounts to various programs in the appropriations acts themselves, such that the Secretary admits that the remaining available appropriations were $1,288,529,000 for 1994, $1,337,042,218 for 1995, and $1,375,245,000 for 1996. (Appellant's Revised Supplemental Br. at 7.) The Secretary admits that he retained the following amounts for "inherently federal functions": $25,522,460 in 1994, $29,613,574 in 1995, and $35,989,621 in 1996. (*Id.* at 8.) These amounts did not constitute "funding for programs, projects, or activities serving a tribe" under section 450j-1(b). The ISDA is clear that contract support costs "shall not be reduced by the Secretary to pay for Federal functions,

including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring." 25 U.S.C. § 450j-1(b)(3) (2000). The Act also provides that contract support costs "shall not be reduced to make funding available for contract monitoring or administration by the Secretary." *Id.* § 450j-1(b)(1). The statute thus makes it quite clear that funds devoted by the Secretary to "inherently federal functions" were not unavailable for contract support costs. Hence, the Secretary was obligated to reprogram these funds in order to pay contract support costs.

The Secretary also admits that "there were unobligated balances . . . during each fiscal year . . . ranging between $1.2 and $6.8 million." (Appellant's Supplemental Br. at 4.)[19] These leftover and unexpended appropriations were also available to the Secretary to meet his contractual obligations and did not constitute funding for programs serving other tribes.

Taken together, the appropriations reserved for "inherently federal functions" and the left-over appropriations were more than sufficient to pay the tribe its full contract support costs. There is, therefore, no need for a remand, as the Secretary urges, to determine what other funds may have been available for the Secretary to meet his contract obligations. The funds reserved for "inherently federal functions" and the left-over appropriations were not funds devoted to programs serving other tribes, and the Secretary could have drawn from those funds to meet his obligations without reducing funding for programs serving other tribes.

Thus, we hold that the Board was correct in holding that the Secretary was not excused from meeting his contractual obligation to pay the appellee its full contract support costs by

---

[19] The appellee claims that the left-over unobligated amounts were substantially larger (Appellee's Br. at 17.)

the clause in section 450j-1(b) providing that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter."

IV

Finally, the Secretary argues that the Board's award of damages to the appellee violated the Appropriations Clause of the Constitution. This argument is untenable.

The Appropriations Clause provides, in pertinent part, as follows: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." U.S. Const. art. I, § 9, cl. 7. The Secretary repeats his arguments that no appropriations were made for contract support costs in excess of those recommended in the committee reports, and that, therefore, the award of damages in this case violates the Appropriations Clause. We have already rejected these arguments. It is true that if an agency, "in the absence of statutory authority, make[s] promises that impose an obligation on the federal Treasury, [it] exceed[s] [its] constitutional authority and abrogate[s] Congress' authority under the Appropriations Clause." *Schism v. United States*, 316 F.3d 1259, 1288 (Fed. Cir. 2002) (*en banc*), *cert. denied*, No. 02-1226 (U.S. June 2, 2003). However, in this case, there was statutory authority for the contract support costs. The Secretary was authorized by Congress to make a contract with the appellee and was required to pay the appellee full contract support costs under the ISDA. Congress then granted the Secretary a lump-sum appropriation with no statutory caps imposed, out of which he was entitled to draw money to meet his contractual obligations. There was, therefore, no violation of the Appropriations Clause.

CONCLUSION

For the foregoing reasons, we hold that the Secretary was obligated to pay the appellee its full support costs and that the Secretary's failure to do so was a breach of contract. Accordingly, the judgment of the Interior Board of Contract Appeals is

AFFIRMED.

COSTS

No costs.

Supreme Court, U.S.
FILED
SEP 25 2003
OFFICE OF THE CLERK

No. 02-1472

In the
Supreme Court of the United States

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the

Supreme Court of the United States

No. 02-1472

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

On July 16, 2003, petitioners submitted a supplemental brief to bring to this Court's attention the Federal Circuit's decision in *Thompson* v. *Cherokee Nation*, 334 F.3d 1075 (2003). On August 18, 2003, the government filed a petition for rehearing and rehearing en banc in that case, and it advised this Court that it had done so by letter dated August 25, 2003. On September 12, 2003, the Federal Circuit denied the government's petition for rehearing en banc. Counsel for petitioners informed the Court of that action by letter dated September 16, 2003. We submit this supplemental brief to inform the Court that, in light of *Thompson*, the government does not oppose further review in this case.

The central question in this case is whether funding for the payment of petitioners' "contract support costs" was

available within the meaning of the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n. The ISDA makes the government's obligation to pay such costs "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for contract support and other self-determination contract costs. 25 U.S.C. 450j-1(b). That condition on the government's payment obligations reflects the fact that, under the ISDA, the Tribe is substituted for a federal agency in furnishing governmental services. A federal agency administering those programs directly would be constrained by the availability of appropriations and the allocation of funds among its programs; Section 450j-1(b) places Tribes taking over those programs in a similar position. In other words, Section 450j-1(b) ensures that Tribes choosing to administer programs in place of a federal agency are subject to the same funding restraints the federal agency would face if it continued to administer those programs itself.

As petitioners note in their supplemental brief, the decision in this case and the Federal Circuit's decision in *Thompson* do reach different results on whether funds were available to pay contract support costs within the meaning of Section 450j-1(b). We agree, moreover, that the decisions genuinely conflict with each other on several issues, including the effect of Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, tit. II, § 314, 112 Stat. 2681-288 (1998), on the "availability" of federal funding for contract support costs for fiscal years 1994 through 1998. It does not appear, however, that the conflict has broad forward-looking significance at the present time. Since fiscal year 1998, Congress has

regularly included *express* caps on funding for contract support costs in the annual appropriations legislation that funds Indian Self-Determination Contracts.[1] There is no disagreement that such express caps render sums beyond the amounts specified by Congress "unavailable" within the meaning of the ISDA. See Pet. Supp. Br. App. 11a; see also *id.* at 21a-22a. As a result, disputes such as the present one, which concern the availability of money for the purpose of paying contract support costs, are unlikely to arise in the future. There are, however, several pending cases (including one class action) that concern years before Congress began to use express funding caps. Those cases expose the Indian Health Service to potential liability of approximately $100 million.

In addition, the Federal Circuit's construction of one provision, 25 U.S.C. 450j-1(b)(3), in *Thompson* may have ongoing programmatic consequences for the Indian Health Service and the Department of Health and Human Services. See Pet. Supp. Br. App. 28a-29a. To the extent that *Thompson* construed Section 450j-1(b)(3) as deeming funds that are needed for inherently federal functions—such as paying the salaries and other expenses necessary to have an Indian Health Service at all—to be nonetheless "available" to pay Tribes under the ISDA, it defies common

[1] See, *e.g.*, Consolidated Appropriations Resolution, 2003, P.L. No. 108-7, 117 Stat. 11, 260-61 (2003) (capping ongoing contract support costs at $270,734,000, and capping new contract support costs at $2,500,000); Department of the Interior and Related Agencies Appropriation Act 2002, Pub. L. No. 107-63, 115 Stat. 414, 456 (2001); Department of the Interior and Related Agencies Appropriation Act, 2001, Pub. L. No. 106-554, 114 Stat. 2673, 2673-214 (2000); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181 to 1501A-182 (1999); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-278 to 2681-279 (1998); Consolidated Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-833 (1997).

sense and threatens the agency's proper functioning. The Indian Health Service is required by statute to exist, 25 U.S.C. 1631, and to administer a variety of programs for the benefit of the Tribes. Section 450j-1(b)(3), and the concept of "availability" more generally, cannot reasonably be understood to require the Indian Health Service to pay tribal contractors appropriated funds the agency needs to fulfill its statutory mission (or to require it to contract for payments that it cannot reasonably make if it is to retain sufficient funds to perform the functions that must continue to be performed by the federal government rather than the Tribes). Doing so would inevitably "reduce funding for [other] * * * activities serving a tribe" in violation of 25 U.S.C. 450j-1(b), since serving the health interests of the Tribes and their members *is* the Indian Health Service's function.

We note, however, that the court of appeals' decision in this case did not specifically address the meaning or effect of 25 U.S.C. 450j-1(b)(3). It is thus not clear that this case presents an appropriate vehicle for further review. See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) (Court ordinarily does "not decide in the first instance issues not decided below"). *Thompson*, by contrast, did address that issue, and petitioner Cherokee Nation in this case was a party in *Thompson* as well. If further review is sought in that case, it would be a more appropriate vehicle for the issue's consideration. It is possible, moreover, that the Court's resolution of other matters specifically addressed by the court of appeals in this case and raised in the petition might in any event make it unnecessary for the Court to reach the construction of 28 U.S.C. 450j-1(b)(3), as well as other issues concerning when funds should be regarded as "available" for payment provided for under contracts.

Nonetheless, on balance, the government does not oppose further review in this case.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

SEPTEMBER 2003

Supreme Court, U.S.
FILED
JUN 18 2004
OFFICE OF THE CLERK

Nos. 02-1472 & 03-853

IN THE

Supreme Court of the United States

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, et al.,
Respondents.

TOMMY G. THOMPSON,
Secretary of Health and Human Services,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
Respondent.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Tenth Circuit and for the Federal Circuit

---

JOINT APPENDIX
Volume I

THEODORE B. OLSON
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record for the Federal Parties

LLOYD B. MILLER
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel of Record for Cherokee Nation and Shoshone-Paiute Tribes

PETITIONS FOR CERTIORARI FILED APRIL 3 AND DECEMBER 11, 2003
CERTIORARI GRANTED MARCH 22, 2004

TABLE OF CONTENTS

Volume I Page

PART 1: Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation v. United States; Tommy G. Thompson, Secretary of Health and Human Services, *et al.*, No. 02-1472

Relevant docket entries from the United States Court of Appeals for the Tenth Circuit (Case No. 01-7106) 1

Relevant docket entries from the United States District Court for the Eastern District of Oklahoma (Case No. 99-092-S CIV) 3

Plaintiffs' Exhibit 4: Indian Self-Determination Memorandum No. 92-2, dated Feb. 27, 1992 6

Plaintiffs' Exhibit 5: Indian Health Service Circular No. 96-04, dated Apr. 12, 1996 20

Plaintiffs' Exhibit 9: Letter to the Indian Health Service Director from the Director of Headquarters Operations, dated Sept. 24, 1997 49

Plaintiffs' Exhibit 16: Affidavit of Winona L. Manning, Finance Director of the Shoshone-Paiute Tribes of the Duck Valley Reservation, dated July 20, 1999 54

Plaintiffs' Exhibit 17: Affidavit of Walden Townsend, Owyhee Community Health Facility Tribal Health Administrator for the Shoshone-Paiute Tribes of the Duck Valley Reservation, dated July 20, 1999 62

Plaintiffs' Exhibit 22: Compact of Self-Governance between the Duck Valley Shoshone Paiute Tribes and the United States of America, Oct. 1, 1994, as amended Oct. 1, 1995 69

TABLE OF CONTENTS—Continued

Page

Plaintiffs' Exhibit 22A: Compact of Self-Governance between the Duck Valley Shoshone Paiute Tribes and the United States of America, Oct. 1, 1994, as amended Oct. 1, 1995, Amendment No. 1 101

Plaintiffs' Exhibit 23: Annual Funding Agreement between the Duck Valley Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America, Oct. 1, 1995 [See JA Vol. II, PART 1 for attached Appendix A (funding tables)]..... 104

Plaintiffs' Exhibit 26: Amendment No. 1, Annual Funding Agreement between the Duck Valley Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America, Oct. 1, 1995, as amended Mar. 6, 1996..... 127

Plaintiffs' Exhibit 27: Annual Funding Agreement between the Duck Valley Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America, Oct. 1, 1996 [See JA Vol. II, PART 1 for attached Appendix A (funding tables)]..... 129

Plaintiffs' Exhibit 34: Shoshone-Paiute Tribes' Letter Re: Contract Disputes Act claim for 1996 contract support costs, dated Sept. 20, 1996 150

Plaintiffs' Exhibit 35: Shoshone-Paiute Tribes' Letter Re: Contract Disputes Act Claim for 1997 Contract Support Costs, dated Sept. 23, 1997..... 154

Plaintiffs' Exhibit 36: Affidavit of Bill Thorne, Executive Director of the Cherokee Nation Health Service, dated July 19, 1999..... 158

TABLE OF CONTENTS—Continued

Page

Plaintiffs' Exhibit 37: Compact of Self-Governance between the United States of America and Cherokee Nation, dated June 30, 1993..... 172

Plaintiffs' Exhibit 39: Fiscal Year 1997 Annual Funding Agreement between the United States of America and Cherokee Nation, dated July 24, 1996 [See JA Vol. II, PART 1 for Attachments]..... 185

Plaintiffs' Exhibit 47: Cherokee Nation's Letter Re: Contract Disputes Act Claim for Fiscal Year 1997 Indirect Costs, dated Sept. 26, 1997..... 201

Plaintiffs' Exhibit 66: Indian Health Service "Procedures for Allocating Prior Year Unobligated Balances to Satisfy CSC Shortfalls" (Draft)..... 206

Plaintiffs' Exhibit 67: Letter from Chief, Department of Health and Human Services, Office of the General Counsel, Indian Health Service Branch, to the Director, Indian Health Service, dated Mar. 25, 1999..... 210

Defendants' Exhibit: Declaration of Carl L. Fitzpatrick, Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service, dated Sept. 3, 1999 [See JA Vol. II, PART 1 for attached tables]..... 213

The Appendix to the Petition for a Writ of Certiorari in Case No. 02-1472 contains the following material which is omitted from the Joint Appendix:

Appendix A: Opinion of the Court of Appeals for the Tenth Circuit, filed Nov. 26, 2002..... 1a

TABLE OF CONTENTS—Continued

Page

Appendix B: Order of the District Court for the Eastern District of Oklahoma, filed June 25, 2001 ..... 24a

Appendix C: Order of the Court of Appeals for the Tenth Circuit denying Appellants' petition for rehearing and suggestion for rehearing *en banc*, filed Jan. 23, 2003..... 51a

---

PART 2: Tommy G. Thompson, Secretary of Health and Human Services, *et al.*, v. Cherokee Nation of Oklahoma, No. 03-853

Relevant docket entries from the United States Court of Appeals for the Federal Circuit (Case No. 02-1286)..... 224

Relevant certified list entries from the Interior Board of Contract Appeals (Nos. 3877-98 through 3879-98)..... 226

Excerpts of the IBCA Appeal File, submitted Mar. 13, 1998

Tab 3 - Cherokee Nation's Letter Re: Contract Disputes Act Claim For FY 1994, 1995, and 1996 Indirect Costs, dated Sept. 27, 1996 229

Tab 11 - FY-1994 Annual Funding Agreement, Attachment 1 to Compact of Self-Governance Between the United States of America and Cherokee Nation, dated June 30, 1993 236

TABLE OF CONTENTS—Continued

Page

Tab 12 - Letter from Acting Director, Office of Tribal Self-Governance, dated June 30, 1993, transmitting Addendum to FY-1994 Annual Funding Agreement (Attachment I to Compact of Self-Governance Between United States of America and Cherokee Nation), dated Aug. 23, 1993..... 241

Tab 13 - Second Addendum to the FY 1994 Annual Funding Agreement (Attachment I to the Compact of Self-Governance Between the Cherokee Nation and the United States of America), Sept. 30, 1993 246

Tab 14 - Addendum No. 3 to the FY 1994 Annual Funding Agreement Between the United States of America and The Cherokee Nation, excluding letter, Sept. 26, 1994 249

Tab 18 - Fiscal Year 1995 Annual Funding Agreement Between the United States of America and Cherokee Nation, dated June 30, 1994 253

Tab 21 - Addendum No. 3 to the FY 1995 Annual Funding Agreement Between the United States of America and The Cherokee Nation (unsigned by the Indian Health Service), excluding letter 260

TABLE OF CONTENTS—Continued

Page

Tab 23 - Fiscal Year 1996 Annual Funding Agreement Between the United States of America and Cherokee Nation, dated June 30, 1995, and Letter from the Cherokee Nation Self-Governance Coordinator to the Acting Director of the Office of Self-Governance, Indian Health Services, dated June 29, 1995 [See JA Vol. II, PART 2 for Attachment #2, AFA Detail Report] 265

Tab 24 - Addendum No. 1 to FY 1996 Annual Funding Agreement Between the United States of America and Cherokee Nation (unsigned by the Indian Health Service) 279

Secretary's Exhibit: Declaration of Carl L. Fitzpatrick, Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service, dated Dec. 18, 1998 286

Secretary's Exhibit: Declaration of Daniel J. Cesari, Deputy Director of the Division of Financial Management at the Headquarters of the Indian Health Service, dated Feb. 18, 1999 [See JA Vol. II, PART 2 for attached table] 288

Secretary's Exhibit: Declaration of Carl L. Fitzpatrick, Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service, dated Mar. 27, 2000 [See JA Vol. II, PART 2 for attached tables] 295

Appellee's Supplemental Brief and Attachments 1-2, filed Apr. 24, 2003 [See JA Vol. II, PART 2 for Attachments 3- 6] 305

TABLE OF CONTENTS—Continued

Page

Supplemental Brief of Appellant Tommy G. Thompson, filed Apr. 24, 2003 [See JA Vol. II, PART 2 for Addendum] 357

Revised Supplemental Brief of Appellant Tommy G. Thompson, filed May 12, 2003, and Declaration of Lovell Hopper, Director of the Division of Financial Management for the Indian Health Service, dated May 12, 2003 [See JA Vol. II, PART 2 for Exhibit 1 to Declaration of Lovell Hopper] 369

The Appendix to the Petition for a Writ of Certiorari in Case No. 03-853 contains the following material which is omitted from the Joint Appendix:

Appendix A:

Opinion of the Court of Appeals for the Federal Circuit, filed July 3, 2003 ..... 1a

Appendix B:

Order of the Court of Appeals for the Federal Circuit denying the Petition for Rehearing *En Banc*, filed Sept. 12, 2003 ..... 36a

Appendix C:

Order of the IBCA accepting the stipulation on damages, filed Nov. 15, 2001 ..... 38a

Appendix D:

Order of the IBCA affirming earlier Order *on reconsideration*, filed Mar. 21, 2001 ..... 43a

Appendix E:

Order of the IBCA concerning liability, filed June 30, 1999 ..... 50a

Appendix F:

Final Decision denying the Cherokee Nation's claims, decided Oct. 31, 1997 ..... 74a

TABLE OF CONTENTS—Continued

Volume II

Page

PART 1: Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation v. United States; Tommy G. Thompson, Secretary of Health and Human Services, *et al.*, No. 02-1472

Appendix A (funding tables) attached to Plaintiff's Exhibit 23: Annual Funding Agreement between the Duck Valley Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America, Oct. 1, 1995 [See JA Vol. I, PART 1 for Exhibit 23] 395

Appendix A (funding tables) attached to Plaintiff's Exhibit 27: Annual Funding Agreement between the Duck Valley Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America, Oct. 1, 1996 [See JA Vol. I, PART 1 for Exhibit 27] 401

Attachments to Plaintiff's Exhibit 39: Fiscal Year 1997 Annual Funding Agreement between the United States of America and Cherokee Nation, dated July 24, 1996 [See JA Vol. I, PART 1 for Exhibit 39] 407

Tables attached to Defendants' Exhibit: Declaration of Carl L. Fitzpatrick, Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service, dated Sept. 3, 1999 [See JA Vol. I, PART 1 for Declaration of Carl L. Fitzpatrick] 421

TABLE OF CONTENTS—Continued

Page

PART 2: Tommy G. Thompson, Secretary of Health and Human Services, *et al.*, v. Cherokee Nation of Oklahoma, No. 03-853

Attachment #2, AFA Detail Report attached to Tab 23: Fiscal Year 1996 Annual Funding Agreement between the United States of America and Cherokee Nation, dated June 30, 1995 [See JA Vol. I, PART 2 for Tab 23] 451

Table attached to Declaration of Daniel J. Cesari, Deputy Director of the Division of Financial Management at the Headquarters of the Indian Health Service, dated Feb. 18, 1999 [See JA Vol. I, PART 2 for Declaration of Daniel J. Cesari]..... 457

Tables attached to Declaration of Carl L. Fitzpatrick, Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service, dated Mar. 27, 2000 [See JA Vol. I, PART 2 for Declaration of Carl L. Fitzpatrick] 459

Attachments 3-6 to Appellee's Supplemental Brief, filed April 24, 2003 [See JA Vol. I, PART 2 for Appellee's Supplemental Brief and Attachments 1-2] 491

Addendum to Supplemental Brief of Appellant Tommy G. Thompson, filed Apr. 24, 2003 [See JA Vol. I, PART 2 for Supplemental Brief of Appellant Tommy G. Thompson] 503

Exhibit 1 to Declaration of Lovell Hopper, Director of the Division of Financial Management for the Indian Health Service, dated May 12, 2003 [See JA Vol. I, PART 2 for Revised Supplemental Brief and Declaration of Lovell Hopper] 525

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-7106

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, on behalf of themselves and all others similarly situated,
Appellants,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services; and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,

Appellees.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
8/13/01	1	[1438890] Civil case docketed. Preliminary record filed. DATE RECEIVED: 08/13/01. Transcript order form due 8/23/01 for Stephen D. Allen. Docketing statement due 8/23/01 for Shoshone-Paiute and for Cherokee Nation. Notice of appearance due 8/23/01 for Michael H. Trujillo, for G. Thompson, for Shoshone-Paiute, for Cherokee Nation. (bjv)
11/26/02	55	[1566374] Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Murphy; Anderson, authoring judge; Baldock. [01-7106] (bjv)

DATE	NO.	PROCEEDINGS
1/6/03	56	[1576081] Petition for rehearing in banc filed by Cherokee Nation and Shoshone-Paiute. Original and 15 copies. c/s: y (lg)
1/22/03	69	[1580723] Order filed by Judges Murphy, Anderson and Baldock denying motions for leave to become amicus [1578924-1], filed by Ramah Navajo Chapter, et al. [1577809-1], [1577331-1], denying Petition for rehearing in banc [1576081-1] (lg)
4/5/04	75	[1698670] Supreme Court order dated 3/22/04 granting certiorari filed. (oac)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 99-092-S CIV

CHEROKEE NATION OF OKLAHOMA, and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Plaintiffs,

v.

UNITED STATES OF AMERICA; DONNA E. SHALALA, Secretary of the United States Department of Health and Human Services; and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
3/5/99	1	COMPLAINT (sb) [Entry date 03/08/99]
4/5/99	3	NOTICE mailed setting case for Status & Scheduling Conference on 4/29/99 at 2:00 p.m. at the United States Courthouse, Muskogee, Oklahoma before the Honorable Frank H. Seay. ENTERING ORDER by Judge Frank H. Seay directing parties pursuant to Rule 26(e), to meet as soon as practicable, but not less than 14 days prior to the Status and Scheduling Conference to discuss the nature and basis of claims and defenses, the possibility of prompt settlement and, consent to proceed before a United States Magistrate Judge. Parties are directed to file with the Clerk of Court a

DATE	NO.	PROCEEDINGS
		joint written report of such meeting four (4) working days prior to the Status and Scheduling Conference. Attorneys shall make known to their clients the contents of the report. The enclosed "Report on Planning Meeting Form", is to be completed and filed with the Clerk. All parties and their counsel are required to sign this form. The signatures of the parties may be submitted by facsimile. (FHS) (cc: all counsel) (law) [Entry date 04/05/99]
4/21/99	4	JOINT MOTION for continuance of the Status & Scheduling Conference and the date for filing joint Report on Planning Meeting. (sg) [Entry date 04/22/99]
4/23/99	6	MINUTE ORDER: denying joint motion for continuance of the Status Scheduling Conference and the date for filing joint Report on Planning Meeting. (FHS) [4-1] (cc: all counsel) (tc) [Entry date 04/23/99]
5/17/99	11	AMENDED COMPLAINT [1-1] by plaintiffs (tl) [Entry date 05/18/99]
6/7/99	13	ANSWER by defendants to plaintiffs' complaint [1-1] (law) [Entry date 06/08/99]
7/23/99	19	MOTION by plaintiffs for summary judgment on the Third Cause of Action ; response deadline 8/9/99 (tl) [Entry date 07/23/99]
7/23/99	22	MOTION by plaintiffs for partial summary judgment of liability on the first and second causes of action ; response deadline 8/9/99 (tl) [Entry date 07/23/99]

DATE	NO.	PROCEEDINGS
7/23/99	24	EXHIBITS by plaintiffs in support of Motion for partial summary Judgment on First and Second Causes of Action [23-1] (tl) [Entry date 07/23/99]
9/7/99	35	MOTION by defendants for summary judgment; response deadline 10/19/99 (ct) [Entry date 09/08/99]
9/7/99	39	MEMORANDUM by defendants in support of motion for summary judgment, and in opposition to plaintiffs' motions for summary judgment (ct) [Entry date 09/08/99]
2/9/01	148	ORDER by Judge Frank H. Seay denying plaintiffs' motion for class certification and for approval of class notice [81-1] (cc: all counsel) (tc) [Entry date 02/12/01]
6/25/01	161	ORDER by Chief Judge Frank H. Seay denying plaintiffs' motion for summary judgment on its first and second causes of action [46-1], denying plaintiffs' motion for summary judgment for a declaratory action regarding Section 314 and granting defendants' motion for summary judgment [35-1] (cc: all counsel) (lw) [Entry date 06/25/01]

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Public Health Service
Indian Health Service Refer to: OTA
Rockville, Maryland 20857

INDIAN SELF-DETERMINATION
MEMORANDUM NO. 92-2

CONTRACT SUPPORT COST POLICY

Sec.

1. Background
2. Purpose
3. Definitions
4. New and Expanded Contracts
5. Procedure for Computing Amount of Contract Support Costs
6. Ongoing Contracts
7. Subsequent Years Considerations
8. Supersession

1. BACKGROUND

The development of this policy is in response to section 106(a) of Public Law 93-638, as amended, the Indian Self-Determination Act, which states:

> Section 106. (a)(1) "The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the program or portions thereof for the period covered by the contract.
>
> (2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—
>
> (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
>
> (B) are provided by the Secretary in support of the contracted program from resources other than those under contract."

2. PURPOSE

To establish the Indian Health Service (IHS) policy for 1) identifying amounts required for direct and indirect contract support funds; and 2) allocating contract support funds for all Public Law (P.L.) 93-638 contracts. All funds for contract support costs are subject to the availability of funds made available for this purpose.

This policy outlines the procedures to be used to determine the need for contract support costs, and to guide the allocation of these funds.

3. DEFINITIONS

Contract Support Costs are:

A. Reasonable costs for activities which must be carried on by the Indian tribe or tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management but which normally are not carried on by the Secretary in his direct operation of the program, or are provided by the Secretary in support of the program from resources other than those under contract; and

B. Costs which are reasonable, necessary and allowable costs of the contractor, which are allocable to the contract based on applicable Federal cost principles; and

C. Costs which are not provided for under the allocation of program funds available for the contract as defined in P.L. 93-638, as amended, Section 106 (a)(1); and

D. Treated as either direct or indirect by the contractor based on applicable cost principles and the contractor's cost allocation policy.

4. NEW AND EXPANDED CONTRACTS

A. The Indian Self-Determination (ISD) Fund will cover certain costs of P.L. 93-638 awards when the award is:

(1) an initial transfer of a program previously operated by the IHS to the tribe or tribal organization, or

(2) to expand current tribal operations through the assumption of additional programs previously operated by IHS, or

(3) to provide initial contract support funding for all new and expanded 638 contracts, including the assumption of programs previously operated by other tribes, tribal organizations, Indian contractors, and for newly recognized tribes.

B. IHS will award funds for contract support costs for new and expanded contracts in the following two categories:

(1) Direct Contract Support Costs:

a. Non-recurring direct contract support costs are costs which are of a non-recurring nature, are otherwise allowable direct contract support costs, and are required for the program to begin operations. These are also referred to as start up costs, but are not intended to be an additional cost category.

b. Recurring direct contract support costs are costs which are of a recurring nature and associated directly with the operation of the program. These funds shall be awarded on a recurring basis.

(2) Indirect or Indirect Types of Costs:

Costs incurred for a common or joint purpose benefitting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved, and which are not funded by other direct costs, and are incorporated in the Indian tribe's or tribal organization's indirect costs reimbursement procedure as negotiated annually with the cognizant Federal agency.

For contractors without negotiated indirect cost rates, indirect-type costs consist of costs which are normally found in indirect cost pools of contractors with rates, and which are negotiated between the contractor and the Area Office using principles of reasonableness, allowability and allocability (see attachment A).

These funds shall be awarded "non-recurring" subject to negotiation in each subsequent year. Those contractors with a surplus of indirect cost support funds will not be allocated additional funds until the need is indicated by the most current negotiated indirect cost rate. (See page 7, Section 6, for special procedures for contracts that have received indirect cost funds as recurring funds). The following illustrations show: 1) total funding for the first year of the contract, and 2) contract costs for subsequent years.

Total funding for first year of the contract

Program Funding Base (106(a)(1) amount)	
Direct Contract Support Costs (Recurring)	Contract support costs provided from ISD fund
Indirect Contract Support costs (non-recurring)	

Contract Costs for Subsequent Years

Direct Costs (recurring)	Receive mandatory increases
Indirect Costs (non-recurring)	Recomputed each year

(3) In subsequent years, direct contract support funds will be considered part of the recurring base of the contract, and will receive mandatory cost increases as do the direct program funds. Amount of indirect contract support funds must be justified each year based on negotiated amounts and any shortfalls are reported to IHS Headquarters for inclusion in the Annual Report to Congress on implementation of P.L. 93-638.

C. (1) Funds for new and expanded contracts will be allocated by IHS Headquarters from the ISD fund on a monthly basis until expended. If permitted by appropriations act, any funds that remain at the end of the fiscal year will be added to any ISD Funds available in the subsequent year. If funds are exhausted at any point in the fiscal year, requests received thereafter will be considered first for funding in the subsequent year from funds appropriated for this purpose.

(2) Area Offices will make requests after receiving proposals for new and expanded contracts. Areas are encouraged to begin discussions with the proposing tribe or tribal organization early to identify the amount of *need* for contract support costs according to procedures detailed in Section 5 of this policy.

Once the amount of need has been identified, and before the end of the 60-day proposal review period, a request for this amount will be submitted to the IHS Office of Tribal Activities, Division of Self-Determination Services to determine if funds are available for this purpose. The Office of Tribal Activities will respond immediately to advise if the funds are available.

While a CSC need may be requested which is greater than the amount determined to be available, the available amount will be the basis for consideration of approval or declination of proposals, and any subsequent award. Deficiencies for existing contracts will be included in the annual report to Congress required by Section 106(c) of the Act.

(3) The requested amount will be the total of indirect and direct contract support costs for each project.

(4) If funds from the ISD Fund are inadequate to fully fund all requests, then requests to be funded that month will be selected based on the earliest receipt date.

5. PROCEDURE FOR COMPUTING AMOUNT OF CONTRACT SUPPORT COSTS

A. Direct Contract Support Costs

For new and expanded contracts, Area Offices will identify the amount needed for direct contract support costs in accordance with the following:

A detailed budget will be prepared for first-time contractors (new and expanded) detailing amounts to be considered as direct program funds, indirect and indirect type contract support costs, and direct contract support costs.

The amount of recurring direct contract support costs will be determined by negotiation between the recipient and the Area Office (see definitions section for direct contract support costs). *Only categories of cost, which are not contained in either the indirect cost pool or the amount computed pursuant to Section 106(a)(1) can be considered as direct contract support costs.* The Area Offices and recipients must agree on the amount of direct contract support costs which will be recurring in future years.

"Recurring" direct contract support costs which may not be in a contractor's indirect cost pool are:

- Unemployment tax on direct program salaries.
- Workers compensation insurance on direct program salaries.
- Cost of retirement and other fringe benefits for direct program personnel in excess of amount funded within P.L. 93-638, as amended, Section 106 (a)(1).
- Long distance telephone charges.
- Postage allocable to direct programs.
- Discipline specific training for direct program personnel not funded in the 106 (a)(1) amount.

The Area Office will also work with the contractor to identify non-recurring direct contract support costs necessary as one time start up costs. These must be required to begin operations. They are not intended to be a program enhancement, and cannot be items of cost included in the 106(a)(1) amount. Examples may include the following:

- Purchase of computer hardware and software.
- Required training and staff development.
- Systems development.
- Equipment and furniture.

Items listed above as examples of recurring and non-recurring direct contract support costs must be justified as such and negotiated with the Area Office. Items not included as examples above, but requested and justified by contractors shall be submitted by the Area Office to IHS Headquarters, Division of Self-Determination Services, for approval. This will contribute to greater consistency from Area to Area.

A single item of cost to be funded shall not be accounted for both in the computation of direct costs, and also in the computation of indirect or indirect-type costs. However, a type of cost may be either direct or indirect depending on the level or function of the organization to which it applies. The Area Office shall ensure that costs are reasonable, necessary, and not duplicative.

To the extent that the Area Office and the contractor cannot agree on an item(s) of cost, the disputed items shall be submitted to the Director, IHS, through the IHS Office of Tribal Activities, Division of Self-Determination Services.

The following is a description of the methodology to be used in computing the amount required for indirect contract support costs.

B. Indirect or Indirect Type Costs

For all contractors, Area Offices will identify the amount required for indirect costs of awards (12 months of operation) for each contract as follows:

(1) Recipients with Established Indirect Cost Rates

The amount of indirect costs expected to be incurred under awards by recipients with rates which have been negotiated or are being negotiated

with the cognizant Federal agency will be determined by applying the negotiated rate(s) to the direct cost base amount for this purpose

(2) Recipients without Established Indirect Cost Rates

Indirect types of costs may be computed by negotiating amounts for the following examples of "indirect-types of costs" listed on the following page. These examples are those most commonly found in the indirect cost pools of recipients with rates. The total amount negotiated for these items will be considered as the recipient's indirect cost for purposes of this allocation procedure.

Management and Administration	Facilities and Equipment	General Services and Expenses
Governing Body	Building Rent/Lease/ Cost Recovery	Insurance and Bonding
Management and Planning	Utilities	Legal Services
Financial Management	Housekeeping/Janitorial	Audit
Personnel Management	Building and Grounds	General Support Services
Procurement/Material Management	Repairs and Maintenance	
Human Resources Management	Equipment	
Records Management		
Property Management		
Data Processing		
Office Services		

Guidelines for the Principles Involved in Negotiating Indirect Costs

A plan for allocation of indirect costs will be required to support the distribution of any indirect costs related to the contracted program. All indirect costs included in the plan will be supported by accounting records which will substantiate the propriety of the indirect costs. The allocation plan should cover all indirect costs of the contractor, and contain, but not necessarily be limited to 1) the nature and extent of services provided and their relevance to the contracted program, 2) the items of

expense to be included in the indirect cost pool, and 3) the methods to be used in distributing cost.

The Office of Management and Budget (OMB), Circular No. A-87, Cost Principles for State and Local Governments, establishes principles and standards for determining indirect costs applicable to contractors (local governments and federally recognized Indian tribal governments). Further, the circular discusses allowable and unallowable indirect costs.

6. ONGOING CONTRACTS

The amount of indirect contract support funds representing the previous year's base will be distributed to Areas "recurring" to fund each Area's indirect cost need. Each contractor's need for indirect contract support shall be determined by calculating changes, if any, in indirect cost rates, bases, and pools. If funds available in the Area's indirect cost base are not adequate to meet total requirements, then the amount available shall be distributed according to each contractor's proportion of total need. These funds will be awarded to the contractor as non-recurring funds. (See 4.A(3) for treatment of direct contract support costs.)

Each year, Areas are required to report additional needs for indirect contract support funds beyond the amount provided in their previous year's recurring base, or any surplus of funds provided in their recurring base based on current year needs.

Transition Period

Some Areas have previously allocated indirect contract support funds as recurring funds to contractors. However, the purpose of this policy is to establish a uniform allocation process for indirect contract support funds, and

will result in these funds being allocated as non-recurring funds to contractors *Agency wide*.

It is not intended for Areas to reduce contract amounts of indirect contract support funds previously allocated as recurring funds without the approval of the contractor. Those contractors with a surplus of indirect contract support funds will not be allocated additional indirect contract support funds until their most current negotiated indirect cost rate indicates an additional requirement for these funds. Mandatory increases for self-determination contracts should be provided only on the recurring base amount (excluding indirect contract support) since actual needs will be negotiated each year for the indirect cost amounts.

7. SUBSEQUENT YEARS CONSIDERATIONS

A. Areas shall maintain a historical record of funds awarded in each of the following categories:

   a) direct program funds

   b) direct contract support funds

   c) indirect cost funding

   d) indirect-type cost funding

B. Federal indirect cost negotiators should be requested to highlight changes, if any, in the contractor's annual cost allocation plan (treatment of items of cost) as an exhibit to the negotiated indirect cost agreement.

C. Contractors and Area Offices must re-negotiate the contractors indirect type cost budget annually if the contractor does not have a formal negotiated indirect cost rate.

D. The same cost allocation rules applying to those contractors with formally negotiated indirect cost agreements will be applicable to those contractors without formally negotiated indirect cost rates.

8. SUPERSESSION

This issuance supercedes any policies or instructions previously issued regarding the allocation of Contract Support Funds.

/s/ Everett R. Rhoades,
EVERETT R. RHOADES, M.D.
Assistant Surgeon General
Director

ATTACHMENT A

PRINCIPLES OF REASONABLENESS, ALLOWABILITY AND ALLOCABILITY

REASONABLE COSTS

A cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of the reasonableness of specific costs must be scrutinized with particular care in connection with contractors or separate programs thereof which receive the preponderance of their support from awards made by Federal agencies. In determining the reasonableness of a given cost, consideration shall be given to:

a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the contractor or the performance of the contract.

b. The restraints or requirements imposed by such factors as generally accepted sound business practices, arms length bargaining, Federal and State laws and regulations, and terms and conditions of the contract.

c. Whether the individuals concerned acted with prudence in the circumstances, considering their responsibilities to the contractor, its members, employees, and clients, and the Government.

d. Significant deviations from the established practices of the contractor which may unjustifiably increase the contract costs.

ALLOCABLE COSTS

A cost is allocable to a particular cost objective in accordance with the relative benefits received. A cost is allocable to a contractor if it is treated consistently with other costs incurred for the same purpose in like circumstances and if it:

1) Is incurred specifically for the contract.

2) Benefits both the contract and other work and can be distributed in reasonable proportion to the benefits received.

3) Is necessary to the overall operation of the contract, although a direct relationship to any particular cost objective cannot be shown.

Any cost allocable to a particular contract or other cost objective under these principles may not be shifted to other Federal contracts to overcome funding deficiencies, or to avoid restrictions imposed by law or by the terms of the contract.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICE
INDIAN HEALTH SERVICE
ROCKVILLE, MARYLAND 20857

REFER TO: OAM

INDIAN HEALTH SERVICE CIRCULAR NO. 96-04

CONTRACT SUPPORT COSTS

Sec.

1. Purpose
2. Authorizing Legislation
3. Definitions
4. Process
5. Supersedure
6. Effective Date

Circular Exhibit 96-04-A: Section 106, Indian Self-Determination and Education Assistance Act, as Amended

Circular Exhibit 96-04-B: Contract Suppost Costs Calculated Using the 80/20 Method

Circular Exhibit 96-04-C: Contract Support Costs Calculation Based on a Detailed Analysis

1. PURPOSE. The purpose of this circular is to provide instructional guidance on:

   - Determining amounts of start-up, direct, and indirect contract support costs (CSC)
   - Allocating pools of Indian Health Service (IHS) funding available for CSC
   - Prioritizing tribal requests for funding of CSC
   - Reporting by the IHS to all tribes and to the Congress

These instructions are not regulations establishing program requirements and are not intended to bind agency personnel. These instructions are intended to provide guidance to IHS personnel to determine and allocate CSC, while allowing judgment and prudence in individual circumstances.

2. AUTHORIZING LEGISLATION. This circular is authorized pursuant to the Transfer Act, title 42 United States Code (USC) §2001 and implementing regulations in Title 42 of the Code of Federal Regulations §36.3. The development of this circular has involved the active participation of representatives from Indian tribes. Since 1992, the procedures discussed in this circular have been applied to contracts awarded pursuant to Title I of the Indian Self-Determination and Education Assistance Act, Public Law (P.L.) 93-638, as amended. The CSC process has also been applied to compacts awarded to tribes that have been selected to participate in the Tribal Self-Governance Demonstration Project (SGDP) pursuant to Title III of P.L. 93-638, as amended. Section 106 of P.L. 93-638, as amended, authorizes funding for all Indian Self-Determination (ISD) and Self-Governance agreements under the Act. Section 106 is provided as Exhibit 96-04-A to this circular, and is cross-referenced to the pertinent sections where instructions or examples have been provided.

3. DEFINITIONS.

   A. Award. An agreement authorized under Title I (contract) or Title III (compact) of P.L. 93-638, as amended.

   B. Awardee. A recipient (tribe or tribal organization) of an award as defined above.

   C. Contract Proposal. Refer to the regulations implementing P.L. 93-638, as amended, and Title 25, USC.

D. Recurring Funds. Contract or compact funds that do not require rejustification each year to the Secretary. Annual increases are provided through congressional mandatory increases or other resource allocation methodologies applicable to the respective funding category of the award.

E. Non-Recurring Funds. Funds that require a rejustification annually, and are awarded based upon an annual resource allocation methodology that considers or is dependent upon other factors (e.g., an indirect cost rate applied to a direct program base that may change the amount to be reimbursed from a single agency as the programs under contract continue to increase).

F. Programs, Functions, Services, and Activities (PFSA). The PFSA including those administrative activities supportive of, but not included as part of, service delivery programs that are otherwise contractible, without regard to the organizational level within the department that carries out such functions, as authorized under P.L. 93-638, as amended.

G. Tribal Shares. A term that refers to a tribe's equitable share of Area office and Headquarters resources only. This definition was originally adopted and utilized in negotiating and awarding Annual Funding Agreements (AFA) under Title III, P.L. 93-638, as amended, and is being consistently applied to Title 1 contracts as authorized under P.L. 93-638, as amended. This term does not refer to a tribe's equitable share of a service unit or program base, which may also be included in a negotiated funding agreement.

H. Self-Governance Request.

(1) Tribes entering the SGDP (Title III) the first year:

The tribe's application to the IHS for a Negotiation Grant, which is subsequently approved for the tribe's participation in the SGDP. The application must include evidence of having completed a sufficient planning activity as described in the Negotiation Grant application instruction.

(2) Tribes joining an existing compact:

The tribe's written notice to the IHS, which is subsequently approved, that it intends to join an existing compact.

(3) Tribes negotiating for new or expanded programs in a subsequent year's AFA:

The tribe's written notice to the IHS that it intends to negotiate for additional programs.

To be considered a valid request for purposes of establishing placement on the ISD priority list, H1, 2, or 3 above must include a clear description of the programs to be negotiated, date that the program operations are to be assumed, or estimate of the amount of program funding required, and the amount of contract support funding required.

4. PROCESS.

A. Determining Amounts of Start-Up, Direct, and Indirect CSC.

(1) Determining the Amount of the Award. Section 106 (a) (1) and 106 (a) (2) of the P.L. 93-638, as amended, provides for funding of contract and compact awards for program costs and CSC respectively. Section 106(a)(1)

provides the awardee the right to the funding the Secretary would have otherwise provided for the PFSA awarded. In addition, section 106(a)(2) authorizes funding that represents costs associated with tribal expenses or PFSAs either not experienced by the Secretary or provided to the Secretary from resources not available to the awardee.

(2) Providing for Cost Reimbursement. Throughout the operation of the program by the awardee, total contract costs, including CSC, are eligible to be reimbursed as either direct or indirect costs. Since tribes often operate more than one program, many of the costs incurred by the awardee are reimbursed through an indirect cost allocation process, usually negotiated by the cognizant agency. Section 106(a)(3) provides authority for tribes to recover costs in this manner, whether they are indirect in nature (benefiting multiple programs) or additional costs associated with operating a single program.

Since some, but not all, of the funds provided in section 106(a)(2) represent costs that are eligible to be reimbursed through this indirect cost recovery method, the procedures below are intended to ensure that needs are accurately identified but avoid a duplication of funding.

For service unit assumptions, or partial service unit assumptions, the costs historically incurred by the IHS will be reviewed to identify types of costs that are similar in nature to those costs that are included in the awardee's indirect cost pool. Those costs that are in the

awardee's indirect cost pool that are similar in nature to the costs incurred by the IHS will be considered as duplicative for purposes of funding for administrative "overhead" purposes (section106 (a) (3) (A) (ii)) In determining whether such costs are similar in nature, the review will consider both the cost category label (travel, supplies, etc.) and how the funds were spent by the IHS.

a. Start Up Costs. Section 106(a)(5) states, "Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary:

(i) To plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(ii) To ensure compliance with the terms of the contract and prudent management."

Examples include:

- Purchase of computer hardware and software
- Required training and staff development
- Systems development (establishing required administrative and other health management systems)
- Equipment and furniture to support the administrative unit

b. Direct CSC. Requirements for these costs will be determined by negotiation between the awardee and the Secretary. Costs for activities

that are not contained in either the indirect cost pool (or indirect cost type budget) or the amount computed pursuant to section 106(a)(1) can be funded as a direct CSC. These funds shall be awarded on a recurring basis.

Examples include, but are not restricted to:

- Unemployment taxes on direct program salaries
- Workers compensation insurance on direct program salaries
- Cost of retirement for direct program salaries
- Long distance telephone charges
- Postage
- Training required to maintain certification of direct program personnel

Items listed above as examples of startup costs and direct CSC must be justified as such and negotiated with the Area office. Items not included as examples above, but requested and justified by awardees shall be submitted by the Area office to IHS Headquarters, Office of Administration and Management (OAM), for approval. This will contribute to greater consistency from Area-to-Area.

c. Indirect or Indirect Types of Cost. Guide-lines for the Principles Involved in Negotiating Indirect Costs:

A plan for allocation of indirect costs will be required to support the distribution of any indirect costs related to the awardee's program. All indirect costs included in the plan

will be supported by accounting records that will substantiate the propriety of the indirect costs. The allocation plan should cover all indirect costs of the awardee, and contain, but not necessarily be limited to: (1) the nature and extent of services provided and their relevance to the awardee's program; (2) the item of expenses to be included in the indirect cost pool, and (3) the methods to be used in distributing cost.

The Office of Management and Budget (OMB) circulars establish principles and standards for determining indirect costs applicable to the awardee. Public Law 103-413 has made modifications to the OMB cost principles otherwise applicable to tribes and tribal organizations.

(i) Awardee with Negotiated Indirect Cost Rates. The amount of indirect costs expected to be incurred under awards by tribes or tribal organizations with rates that have been negotiated or are being negotiated with the cognizant Federal agency, will be determined by applying the negotiated rate(s) to the direct cost base amount for this purpose. The amount to be reimbursed will be consistent with the individual awardee rate agreement, reflecting any exclusions required by the agreement.

(ii) Awardee without Negotiated Indirect Cost Rates (Guidelines for Agency Negotiators). A lump sum amount for "indirect types of costs" may be computed for awardees who do not have formally negotiated agreements with their cognizant

agency for reimbursement under an indirect cost rate. This annual lump sum amount may be calculated by negotiating a fixed amount for "indirect types of costs" Categories of costs often considered "overhead" or "indirect-type" are generally in the categories of Management and Administration, Facilities and Equipment General Services, and Expenses. Examples of indirect costs are:

Examples of "Overhead" or "Indirect-type" Costs

Management & Administration	Facilities & Equipment	General Services & Expenses
Governing Body	Building	Insurance &
Management & Planning	Utilities	Legal Services
Financial Management	Housekeeping/ Janitorial	Audit
Personnel Management	Building & Grounds	General
Procurement/ Materiel	Repairs & Maintenance	Interest
Human Resources	Equipment	Depreciation/U
Property Management		
Records Management		
Data Processing		
Office Services		

(3) Alternative Methods for Calculating Amount of Section 106 (a)(1) Funds in Area Office and Headquarters "Tribal Shares." With respect to amounts to be considered as the direct program base (for the purpose of calculating indirect or indirect-type costs) from amounts of PFSAs transferred from Areas and Headquarters "Tribal Shares," at the option of the awardee, the IHS and the awardee will either:

a. Conduct a case-by-case detailed analysis of the "purpose for which the funds were utilized by the Secretary" in order to avoid a duplication in amounts funded.

In cases where a detailed analysis is performed, it will be conducted in the following manner:

Area/Headquarters tribal shares will be reviewed to identify types of costs that are similar in nature to those costs that are included in the awardee's indirect cost pool. Those costs that are in the awardee's indirect cost pool that are similar in nature to Area/Headquarters tribal shares will be considered as duplicative for purposes of funding for administrative or "overhead" purposes Section 106 (a) (3) (A) (ii)).

In determining whether such costs are similar in nature, the review will consider both the cost category label (travel, supplies, etc.) and how the funds were spent by the IHS.

b. Apply the following "split" of total Area and Headquarters tribal shares as specified below:

In the absence of a detailed analysis by the awardee and the IHS, 80 percent of Area/ Headquarters tribal shares will be considered as direct program funds (section 106 (a) (3) (A) (I)) and 20 percent of such tribal shares will be considered as funding for administrative or "overhead" purposes (section 106(a) (3) (A) (ii)).

Once an amount is computed for a direct program or an indirect or overhead purpose under method a. or b. above, it will be used in accordance with the terms of the rate agreement or alternative method provided herein, for calculating the amount required

for indirect or indirect type costs. The balance of the tribal shares not considered as direct program expenses (and therefore not used to calculate indirect cost funding requirements) will be considered as available for CSC for the respective awardee. Any such balance, if in excess of the CSC requirement, shall also remain with the awardee. Any excess CSC requirements not funded by the portion of the Area or Headquarters tribal shares to be considered as available for CSC, will be eligible for payment from the ISD fund, and the processes specified in this circular for allocation of funding in this pool will apply.

Exhibit 96-04-B illustrates how the 80/20 method would be calculated, and Exhibit 96-04-C illustrates how a detailed analysis would be calculated.

(4) Allocating Funding Available for CSC. Essentially three pools of funding are contained in the single IHS budget activity for CSC. The first pool represents an increase in the IHS appropriation for CSC for new and expanded awards. The second pool represents amounts awarded in the prior year that are made available to the IHS on a recurring basis. The third pool represents amounts provided for mandatory increases on the prior year "base" and shortfall funds, if appropriated. Each one has funding priorities and eligibility requirements for costs to be reimbursed.

a. Pool No.1- The Indian Self-Determination Fund. The ISD Fund will cover CSC when an award is:

(i) (1) An initial transfer of a program previously operated by the IHS to the tribe or tribal organization; or (2) to expand current tribal operations through the assumption of additional shares of PFSAs previously operated by the IHS, regardless of the organizational level at which it was operated; or (3) assumption of programs previously operated under awards to other tribes, tribal organizations, contractors, and for newly recognized tribes; or (4) new or expanded programs available because of new appropriations, excluding mandatory increases.

(ii) Initial Funding Period-First Come First Served. Funds for new and expanded programs will be allocated by IHS Headquarters as expeditiously as possible. Approved requests for CSC for new and expanded programs will be funded at 100 percent of the approved amount on a first come first served basis. Allocation will be based on a priority list until funding for the ISD funds is exhausted. If permitted by appropriations act, any funds that remain in the ISDF at the end of the year will be added to funds to be made available in the subsequent year. If funds are exhausted in any fiscal year (FY), tribes on the priority list will remain on the priority list and be considered in priority order when funding is made available by appropriation or reprogramming.

Indirect CSC (non-recurring)
Start-up Costs Direct CSC

The ISD fund is the source of funds in the initial funding period.

Program Base
(106 (a) (1) amount)

(iii) Priority Determined by Date of Request. A priority list for each FY will be developed for every tribe with a requested start date in the proposal (Title I) or request (Title III) in that FY. Tribes will be placed on the priority list within the FY based on:

(a) The date of receipt by the IHS Area office of a Title I contract proposal.

(b) The date of receipt by the IHS Area office of a request to negotiate a Title III award.

(iv) Roles and Resposibilities. Tribes will provide either (a) or (b) above to the Area office. The Area office will provide a copy to OAM, and in the case of Title III, an additional copy will be provided to the Office of Tribal Self-Governance (OTSG). In providing either (a) or (b) above, the tribe will include a clear estimate of the amount of CSC required.

The Area office will be responsible for negotiating the CSC and forwarding the recommendation to OAM. In the case of Title III, an additional copy will be forwarded to the OTSG. The Area office shall ensure that costs are reasonable, necessary, and not duplicative.

To the extent that the Area office and the awardee cannot agree on an item(s) of cost, the disputed item(s) shall be submitted to the Director, IHS, through the Headquarters OAM.

(v) Information and Documentation by IHS. The priority list will be maintained by OAM and distributed quarterly to Area offices. The list will include tribe or tribal organization, proposed start date, date of request or proposal, estimated amount of the program costs to be awarded, estimated amount of CSC approved and awarded, and remaining funds available. The OAM will revise estimated amounts of CSCs as additional data becomes available through negotiations.

(vi) Changes in Start Date. While awaiting award of ISD funding, tribes or tribal organizations may choose to delay their starting date, if necessary, because of the delay in the award of contract support funding. Such choice shall not change the placement of the tribe or tribal organization on the priority list. The priority list shall be maintained by OAM and reviewed periodically to ensure the validity of start dates and the amounts needed.

If a tribe changes the FY start date for any reason other than solely the lack of CSC funding, it will be placed in the new FY by its original date.

(vii) Subsequent Funding Periods. Beginning in year 2, direct contract support and section 106(a)(1) funds will be considered part of the recurring base of the award. Mandatory funding increases will be provided based on congressional appropriation. The amount of direct contract support funds may be renegotiated annually at the option of the awardee. The amount of indirect contract support funds must be justified each year based on the awardee's indirect cost agreement or mutually negotiated amounts. Any shortfalls in funding are reported to the Headquarters OAM by Area offices and the OTSG for inclusion in required reports to the Congress, and other reporting to tribes.

Indirect CSC* *(Non-recurring to awardee, recurring to Area)*	**Indirect CSC base amount in subsequent years is described below. Pool No.2 Increases/ decreases to indirect CSC base amount are governed pool No. 3, also described below.*
Direct CSC** *(Recurring to awardee and Area)*	
Program Base** *(Section 106(a)(1) amount) Recurring to awardee and area)*	***Treating as recurring i.e., not adjusted unless tribe request to renegotiate in subsequent years).*

b. Pool No. 2 Prior Year CSC Base (Ongoing Awards). The amount of indirect contract support funds representing the previous year's base will be distributed to Areas as "recurring" to fund each Area's indirect cost need. Each awardee's need for indirect CSC shall be determined by calculating changes, if any, in indirect cost rates, bases,

and pools. If the funds available in the Area's indirect cost base are not adequate to meet all awardee's requirements, then the amount available shall be distributed according to each awardee's proportion of total need, except that prior year funds should not be reduced if justified as described below. These funds will be awarded to the contractor as non-recurring funds.

c. Pool No. 3 Mandatory Increases/ Shortfall Funds. Mandatory increases that represent a percentage of the Area's prior year recurring indirect cost base are distributed annually as available. Additional shortfall funds may also be made available to the IHS and allocated to Area offices for this purpose. Since awardees are required to rejustify their needs for indirect CSC each year, amounts required for indirect CSC may exceed the amount available for this purpose. Mandatories should be allocated in such a manner as to provide increases to awards based on each awardee's proportion of total additional need. If additional need is proportionately greater for some awardee's, they will receive a greater percentage of CSC mandatories and shortfall funds.

Prior year funds provided for indirect CSC to each awardee, if justified in subsequent years, shall not be reduced by the IHS, except as authorized in section 106(b) of the ISDA. Awardee should expect to receive these funds continuously, only if they continue to be justified for at least the

same amount or greater annual need. They are awarded as non-recurring funds to enable the Area to adjust amounts previously awarded if the amount of costs allocated to the IHS for reimbursement should decrease. If amounts previously awarded for indirect CSC are not justified by an awardee in a subsequent year, they will be made available for distribution to other awardees in the Area with unfunded CSC needs for this purpose.

Note: It is not intended for Areas to reduce contract amounts of indirect contract support funds allocated prior to FY 1992 (original date of ISDM No. 92-2, Contract Support Cost Policy was February 27, 1992) as recurring funds without approval of the contractor.

B. Requirements for Reporting and Documenting Amounts of CSC Funds Available, Needed, and Requested. Areas shall maintain an historical record of funds negotiated and awarded in each of the categories:

- Direct program funds
- Start-up costs
- Direct contract support funds
- Indirect cost funding
- Indirect-type cost funding
- Indirect cost rates
- Types of rates
- Types of bases
- Pass through/exclusions

5. SUPERSEDURE. Indian Self-Determination Memorandum No. 92-2, "Contract Support Costs Policy," dated February 27, 1992, and any policies or instructions previously issued regarding the allocation of contract support funds.

6. EFFECTIVE DATE. The policy and procedures contained in this circular are retroactive to April 1, 1996, upon signature by the Director, IHS.

/s/ Michael H. Trujillo, M.D,
MICHAEL H. TRUJILLO, M.D., M.P.H.
Assistant Surgeon General
Director, Indian Health Service

Circular Exhibit 96-04-A
(4/12/96)

Indian Self-Determination and Education and Assistance Act
Public Law 93-638, As Amended

Section 106: [Contract Funding] [25 USC Sec. 450j-1]

[CONTRACT FUNDING]

SEC. 106 [25 USC 450j-l]. (a) (1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractible, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under section 106 (a) (1).

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this Act, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall—

(A) be used to provide additional services or benefits under the contract; *OR*

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 8.

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary—

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) The amount of funds required by subsection (a)—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to—

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated

data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this Act or as provided in section 105 (c) [450j (c)]. Notwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act.

(c) The Secretary shall provide an annual report in writing on or before May 15 of each year to the Congress on the implementation of this Act. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and budget activity for direct program costs and contract support costs of tribal organizations under self-determination contracts during the previous fiscal year;

(2) an accounting of any deficiency of funds needed to provide required contract support costs to all contractors for the current fiscal year;

(3) the indirect costs rate and type of rate for each tribal organization negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pools; and

(6) an accounting of any deficiency of funds needed to maintain the preexisting level of services to any tribes affected by contracting activities under this Act, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle to a different accounting cycle, as authorized by section 105(d).

(d)(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

(e) Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A-87, incurred for fiscal years prior to fiscal year 1992.

(f) Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report or, for any period covered by law or regulation in force

prior to enactment of Chapter 75 of Title 31, United States Code, or any other required final audit report.

Such notice shall set forth the right of appeal and hearing to the board of contract appeals pursuant to section 110 [450m-1]. For the purpose of determining the 365-day period specified in this paragraph, an audit report shall be deemed to have been received on the date of actual receipt by the Secretary, if, within 60 days after receiving the report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency report as insufficient due to noncompliance with chapter 75 of title 31, United States Code, or noncompliance with any other applicable law. Nothing in this subsection shall be deemed to enlarge the rights of the Secretary with respect to section 16 of the Indian Reorganization Act of June 18, 1934 (25 USC 476, 48 Stat. 984).

(g) Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under section 106 (a), subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

(h) In calculating the indirect costs associated with a self-determination contract for a construction program, the Secretary shall take into consideration only those costs associated with the administration of the contract and shall not take into consideration those moneys actually passed on by the tribal organization to construction contractors and subcontractors.

(I) On an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the Indian Health Service and the Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in

formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to section 1105 of title 31, United States Code).

(j) Notwithstanding any other provision of law, a tribal organization may use funds provided under a self-determination contract to meet matching or cost participation requirements under other Federal and non-Federal programs.

(k) Without intending any limitation, a tribal organization may, without the approval of the Secretary, expend funds provided under a self-determination contract for the following purposes, to the extent that the expenditure of the funds is supportive of a contracted program:

(1) Depreciation and use allowances not otherwise specifically prohibited by law, including the depreciation of facilities owned by the tribe or tribal organization.

(2) Publication and printing costs.

(3) Building, realty, and facilities costs, including rental costs or mortgage expenses.

(4) Automated data processing and similar equipment or services.

(5) Costs for capital assets and repairs.

(6) Management studies.

(7) Professional services, other than services provided in connection with judicial proceedings by or against the United States.

(8) Insurance and indemnification, including insurance covering the risk of loss of or damage to property used in connection with the contract without regard to the ownership of such property.

(9) Costs incurred to raise funds or contributions from non-Federal sources for the purpose of furthering the goals and objectives of the self-determination contract.

(10) Interest expenses paid on capital expenditures such as buildings, building renovation, or acquisition or fabrication of capital equipment, and interest expenses on loans necessitated due to delays by the Secretary in providing funds under a contract.

(11) Expenses of a governing body of a tribal organization that are attributable to the management or operation of programs under this Act.

(12) Costs associated with the management of pension funds, self-insurance funds, and other funds of the tribal organization that provide for participation by the Federal Government.

(*l*) (1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self-determination contract, if the Secretary determines that the tribal organization has failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds.

(m) The program income earned by a tribal organization in the course of carrying out a self-determination contract—

(1) shall be used by the tribal organization to further the general purposes of the contract; and

(2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

(n) To the extent that programs, functions, services, or activities carried out by tribal organizations pursuant to contracts entered into under this Act reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of contract funds determined under subsection (a), the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(o) Notwithstanding any other provision of law (including any regulation), a tribal organization that carries out a self-determination contract may, with respect to allocations within the approved budget of the contract, rebudget to meet contract requirements, if such rebudgeting would not have an adverse effect on the performance of the contract.

Circular Exhibit 96-04-B
(4/12/96)

Contract Support Costs Calculated Using the 80/20 Method

Assumptions:

1. Tribe A has $100,000 in Area and Headquarters Tribal Shares
2. Indirect cost rate = 30%
3. New budgeted tribal wages = $48,000
4. Direct Contract Support = 15% of wages
5. No excluded items
6. Other Direct Contract Support Costs = $5,000

Expanded program base $100,000 tribal shares x 80%	$80,000
DCSC fringe $48,000 wages x 15%	$7,200
Other DCSC	$5,000
Sub-total direct	$92,200
Less excluded items	$0
Total direct	$92,200
x 30% indirect cost rate	$27,660
TOTAL Direct and Indirect	$119,860

ISD Calculation

DCSC recurring	$12,200
ICSC non-recurring	$27,660
TOTAL CSC	$39,860
Less tribal shares available for CSC	$(20,000)
TOTAL ISD Request	$19,860

Tribe A would receive $100,000 from tribal shares and $19,860 would be requested from the ISD fund.

Circular Exhibit 96-04-C
(4/12/96)

Contract Support Costs Calculation Based on a Detailed Analysis

Assumptions:

1. Tribe B has $100,000 in Area and Headquarters tribal shares
2. Detailed analysis indicates that $10,000 of tribal shares are similar in nature to costs included in tribe B's indirect cost pool
3. Indirect cost rate = 30%
4. New budgeted tribal wages = $48,000
5. Direct contract support fringe = 15% of new wages
6. Other direct contract support = $5,000
7. No excluded items

Expanded program base $100,000-$10,000	$90,000
DCSC Fringe $48, 000 x 15%	$7,200
Other DSCS	$5,000
Sub-total direct	$102,200
Less excluded items	$0
Total direct base	$102,200
x 30% indirect cost rate	$30,660
TOTAL Direct and Indirect	$132,860

ISD Calculation

DCSC recurring	$12,200
ICSC non-recurring	$30,660
TOTAL CSC	$42,860
Less tribal shares available for CSC	$(10,000)
TOTAL ISD Request	$32,860

Tribe B would receive $100,000 from tribal shares and $32,860 would be requested from the ISD fund.

Date: September 24, 1997

To: Director

From: Director of Headquarters Operations

Subject: 1997 Report to Congress on Funding of Self-Determination Awards, and Contract Support Cost Shortfall

I am transmitting the above subject Report to Congress for your approval. The Report is submitted in response to Section 106(c) of P.L. 93-638. It communicates to the Congress that IHS has obligated $688 million in FY 1996 for program costs of Self-Determination contracts and Self-Governance compacts. Additionally, IHS has obligated $153 million in FY 1996 for Contract Support Costs (CSC) of all awards under P.L. 93-638, and has identified a shortfall in funding of CSC for FY 1997 of $82 million. The preparation of this Report has been coordinated with each IHS Area Office, the Office of Tribal Self-Governance, the Office of Tribal Programs and the Office of Management Support/ Division of Financial Management. I recommend that you approve this Report.

/s/ Luana Reyes
LUANA REYES
Director of Headquarters Operations

Prepared by: /s/ Athena S. Windy Boy
- ATHENA S. WINDY BOY, Director, MPSS

Approved by: /s/ Carl Fitzpatrick
CARL FITZPATRICK, Director, DFM

/s/ Merry Elrod
for DOUGLAS BLACK, Director, OTP

/s/ [illegible]
for PAULA WILLIAMS, Director, OTSG

Concurrence: /s/ Robert G. McSwain
Robert G. McSwain, Director, OMS

Report to Congress on Funding Requirements
for Contract Support Costs
of Self-Determination Awards

In Response to:
Section 106c of P.L. 93-638, as amended.

Fiscal Year 1997

Prepared by the
Indian Health Service
Department of Health and Human Services

/s/ [illegible]
Director, Indian Health Service

Report to Congress on Funding Requirements
for Contract Support Costs
of Self-Determination Awards

Introduction

This report is provided in response to Section 1060 of P.L. 93-638, as amended (hereafter referred to as the "Act"). The Act requires an annual accounting of funds provided for direct program costs and contract support costs of tribal organizations under self-determination contracts. We have also included in this report, amounts of direct program costs and contract support costs of self-governments compacts awarded under Title III of the Act. Both contracts and compacts are equally eligible for contract support costs. The information presented includes amounts for both types of awards made under the Act. They will both be referred to throughout this report as "awards."

Background

The Act authorizes the Secretary to fund costs of awards in addition to what the Secretary would have otherwise provided

for the direct operation of the program. These costs are referred to as contract support costs (CSC). Amounts of CSC funding are for activities either not carried out by the Secretary, or are carried out by the Secretary from resources other than those under contract. Since 1994, funding for new and expanded awards has been increasingly inadequate.

The Indian Health Service (IHS) has worked extensively with the active participation of tribal representatives to develop policies and procedures in this area. The first Agency policy was approved in February 1992. It has been recently modified to include self-governance compacts as eligible for CSC, and details procedures for calculating CSC requirements when a tribe is assuming operation of their tribal share of Area Offices and Headquarters. The most recent IHS policy on CSC was approved by the Director in April 1996, and is IHS Circular 96-04 (See Attachment 1). This purpose of this policy is to provide instructional guidance on 1) determining amounts of required CSC; 2) Allocating pools of IHS funding available for CSC; 3) prioritizing tribal requests for CSC; and 4) reporting by the IHS to all tribes and to the Congress.

Status of Current Year Requirements

Currently an $82 million shortfall exists in funding requirements for contract support costs. The major component of the Fiscal Year (FY) 1997 shortfall consists of requests for first year contract support funding for new awards. This component of the total shortfall is currently in excess of $49 million, and is continuing to grow. Historically, lack of adequate CSC funding has been an impediment to contracting under the Act. However, virtually all of the tribes on this waiting list for first year funding have chosen to begin operations without adequate CSC funding.

When a tribe begins operations without adequate CSC, an immediate shortfall is created. Tribes with indirect cost rate

agreements may show an "underrecovery" of CSC for the first year of operation in these cases, the indirect cost rate for the next year would be increased to allow for adequate cost recovery by the tribe. Therefore, current year shortfalls in CSC funds serve to inflate CSC requirements in subsequent years.

Linkage with other Reports to Congress on CSC

Much interest has been expressed by the Congress in the increasing requirements for CSC. Shortfalls are increasing annually. A study was recently conducted by the IHS, with the participation of tribal representatives, the Department of Interior, Bureau of Indian Affairs, and the Office Of the Inspector General, in response to House Report No. 104-173 regarding CSC escalation. This report was submitted to the Congress in May 1997 (See Attachment 2). Much of the information provided in the May 1997 report is similar in nature to the information requested in Section 1060 of the Act.

Total Funding Provided for Direct Program Cost and Contract Support Cost for Self-Determination Awards During FY 1996.

Total FY 1996 program funds awarded to tribes and tribal organizations for self-determination contracts and self-governance compacts:	$688,000,000
Total FY 1996 funds for contract support costs awarded to tribes and tribal organizations for self-determination contracts and self-governance compacts:	$153,026,000

An Accounting of any Deficiency of Funds Needed to Provide Required Contract Support Cost to all Awardees for FY 1997.

Current shortfall from new and expanded awards:	$49,137,000
Current shortfall from increased costs of ongoing awards:	$32,819,000
Total CSC shortfall for FY 1997:	$81,956,000

Details of Indirect Cost Rates, Types of Rates, Direct Cost Bases, Types of Bases, Indirect Cost Pools and Types of Cost Included in the Pools, for each Tribal Organization Negotiated with the Appropriate Secretary.

This information is provided in Attachment 3 to this report.

Exhibit 16

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 99-092-S CIV

CHEROKEE NATION OF OKLAHOMA; AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

DONNA E. SHALALA, Secretary of the United States Department of Health and Human Services; and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,
Defendants.

STATE OF NEVADA)
) ss.
COUNTY, OF ELKO)

AFFIDAVIT OF WINONA L. MANNING

I, WINONA L. MANNING, being first duly sworn, depose and state as follows:

1. I am Finance Director of the Shoshone-Paiute Tribes of the Duck Valley Reservation (Tribes), a position I have held since November 3, 1980.

2. In my capacity as Finance Director, I have extensive personal knowledge of and responsibility for the various agreements entered into between the Tribes and the Indian Health Service (IHS) described in this affidavit, and was personally involved in negotiating each of them. Among

other things, I am familiar with the amount of funding agreed to and provided under those agreements and associated agreements. In addition, I have detailed first-hand knowledge of the various IHS programs operated under those agreements and the administration of those programs by the Tribes during fiscal years 1981 through the present. As Finance Director, I am also familiar with the organization and operation of the Tribal government.

3. I am also very familiar with the history of the Tribes and the IHS health programs serving them. I directed the research and writing of four books for the Inter-Tribal Council of Nevada on the history of the four Indian tribes in Nevada, all published by the University of Utah Press. They are *Numa: A Northern Paiute History* (1976); *Newe: A Western Shoshone History* (1976); *Nuwivi: A Southern Paiute History* (1976); and *Wa She Shu: A Washo History* (1976).

4. The Tribes have an enrolled population of approximately 1,800 members, about 1,500 of whom live on or very near the Duck Valley Reservation. The reservation includes about 290,000 acres in the remote and lightly inhabited high desert of southern Idaho and northern Nevada. The center of the reservation is a broad valley that covers an area of about 10 miles by 25 miles. Irrigated by the Owyhee River and associated canals, the valley provides land for agriculture, particularly growing feed for cattle. Other portions of the high plateau lands and mountains surrounding the valley are used for seasonal grazing. Tribal headquarters and the Tribes' health facility are located in Owyhee, Nevada, adjacent to the Idaho border in the center of the reservation. The nearest cities to Owyhee are Mountain Home, Idaho, located approximately 97 miles to the north, and Elko, Nevada, located about 94 miles to the south. The closest major city is Boise, Idaho, located about 143 miles north of the reservation. The nearest other health facilities are in Mountain Home and Elko, nearly 100 miles away from the Tribes' health facility.

A map accurately depicting this area and the distance to other health facilities accompanies Plaintiffs' Motion as Exhibit 33.

5. The reservation was established by executive order in 1877 at the request of a western Shoshone leader and initially occupied by bands of western Shoshone as a permanent place to live and pursue farming and ranching. Previously, these bands had ranged throughout what is now Nevada, Oregon, Northern California, Idaho, and Utah. Additional lands were added to the reservation in 1886 and 1910 to accommodate more bands of western Shoshone and Northern Paiute that came to settle there or that were forcibly located there by the federal government.

6. The Tribes have adopted a constitution under section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. The governing body of the Tribes is the Business Council, made up of a Chairman and six members who are elected by the tribal membership to staggered, three-year terms. The Business Council has the power to pass tribal laws and ordinances, regulate tribal businesses and appropriate funds for use by the executive departments. It also directs tribal activity through an administrative staff headed by a Tribal Health Administrator, a Tribal Programs Administrator, and a Support Services Administrator.

7. The Tribes currently employ about 225 full-time or full-time-equivalent employees, including 95 positions in the health program.. (This includes individuals who are federal employees assigned to the Tribes pursuant to Intergovernmental Personnel Act Agreements or Memoranda of Agreement.) Other employers on the reservation include a public school for the reservation and surrounding areas, construction, firefighting, recreation, law enforcement, private businesses such as a motel and a gas station, and the many local ranching and farming operations.

8. The first full-time physician was assigned to the reservation in 1882. In 1916, work began to convert a school to a five-bed hospital. A second, 12-bed hospital was built in 1936 and used until 1976, when the IHS built the 15-bed Owhyee Community Health Facility (hospital) now in use.

9. In 1988, I was present at a meeting with IHS when it announced plans to terminate inpatient care at the hospital within one year. The Tribes responded by beginning to study ways to maintain and improve the health services on the. reservation, and by obtaining a five-year congressional moratorium on the proposed termination of inpatient services at the hospital. As part of these efforts, the Tribes commissioned a detailed "Full Utilization Study" of the hospital to identify the needs for health services on the reservation and the ways that those needs could be met within the applicable administrative and funding constraints. Based on this study and other information, the leadership of the Tribes concluded that inpatient services at the hospital were an important part of health care on the reservation and could be provided efficiently under proper administration. In addition, the leadership of the Tribes concluded that substantial improvements in the health care system on the reservation could also be implemented by making changes in the hospital's operation with regard to outpatient and community health services, as well as inpatient services.

10. In 1994, faced with losing inpatient care at the hospital, the Tribes chose to enter into a Compact of Self-Governance with the United States to take over the hospital and preserve its full range of services. (A true and correct copy of the Tribe's original compact accompanies Plaintiffs' Motion as Exhibit 19.) Tribal members supported this decision by voting affirmatively on a referendum regarding the issue.

11. As a first step in this process, the Tribes at the beginning of fiscal year 1995 expanded an existing (1991) self-determination contract with the IHS under Title I of the Indian Self-Determination and Education Assistance Act (ISDEA) to include additional portions of the IHS community health program. (A true and correct copy of the original contract accompanies Plaintiffs' Motion as Exhibit 18, and a true and correct copy of "Modification 16" to the contract, which added the community health programs, accompanies the Motion as Exhibit 20). The Tribes then transferred this program on January 1, 1995 to an Annual Funding Agreement (AFA). (A true and correct copy of the FY 1995 AFA, as amended, accompanies the Plaintiffs' Motion as Exhibit 21.) At the beginning of fiscal year 1996, the Tribes again expanded the AFA to cover the rest of the IHS programs provided on the reservation, including inpatient hospital services, and the Compact was amended. (True and correct copies of the FY 1996 AFA and of the Compact, as amended October 1, 1995, accompany Plaintiffs' Motion as Exhibits 22 and 23.)

12. The Tribes made the decision to take over all the IHS programs on the reservation under their Compact in fiscal year 1996 with the understanding that doing so would be a large and costly undertaking for the Tribes' administration. Prior to assuming operation, the Tribes' total revenues and expenditures were $3,685,080, while according to IHS, its budget for direct services at the hospital (not including contract support costs) was more than $5 million. To make sure that the Tribes could properly administer the new programs, we made sure to negotiate contract support costs, both for the start-up expenses and for ongoing expenses. (A true and correct copy of the Tribes' Contract Support Cost Budget, August 7, 1995, accompanies Plaintiffs' Motion as Exhibit 24, and a true and correct copy of the Tribes' FY 1996 IDC Negotiation Agreement accompanies Plaintiffs' Motion as Exhibit 25. In March 1996, the FY 1996 AFA was

amended to reflect the Tribes' agreement with IHS regarding contract support costs. (A true and correct copy of Amendment No. 1 to the FY 1996 AFA accompanies Plaintiffs' motion as Exhibit 26.)

13. The Tribes planned to use the start-up, or non-recurring costs, to hire additional staff and install a new accounting system capable of handling the expansion. In addition, the Tribes recognized that the transition would require extensive training of the staff and tribal leadership as well as the use of outside specialists and consultants.

14. Despite these agreements and plans, the IHS did not provide any contract support funds to cover the expense of taking over and administering the new programs. Instead, IHS officials informed the Tribes that Congress had not appropriated enough money to pay contract support costs to the Tribes and that the Tribes had been put on a list ranked according to the date of their request to take over the programs. The IHS told the Tribes that it could only fund the tribes that were at the top of the list, and would not fund the Tribes until they rose high enough on the list. At the time, the IHS stated that the Tribes would rise high enough on the list to receive at least some funding—perhaps fifty percent—in the next year, fiscal year 1997.

15. Based on this information and the threat that the IHS would close the hospital entirely and shift many services away from the reservation, the Tribes made a decision to go ahead with the programs. We entered into a new AFA with IHS for FY 1997 and negotiated a new FY 1997 Indirect Cost Agreement. (True and correct copies of the Tribes' 1997 AFA and FY 1997 Indirect Cost Negotiation Agreement accompany Plaintiffs' Motion as Exhibits 27 and 28.) Two months into fiscal year 1997, however, the IHS informed the Tribes that they would not receive any contract support funding until fiscal year 1998. Finally, the Tribes received funding in fiscal

year 1998. However, the impact of the two years without funding is still being felt in the health services on the reservation.

16. In particular, the lack of funding contributed to the Tribes' inability to fill 27 of the 66 vacant positions in the health programs when we assumed operation of the hospital, including three key administrative positions, a substance abuse program specialist, a clinical psychologist, a mental health technician, a community health nurse, a public health educator, two cooks, a medical social worker, a quality assurance officer, two physicians (out of three), a physician's assistant, an accounting technician, three supervisory clinical nurses, six clinical nurses, a pharmacist, and a maintenance mechanic. (Since receiving funding in fiscal year 1998, the Tribes have filled most of these positions.)

17. Further, during 1996 and 1997, the Tribes did not have the funds to remedy significant deficiencies in the hospital that had developed during the IHS's administration of the facility. At the time IHS turned the facility over to the Tribes, a "Deep Look Survey" by the IHS Phoenix Area office identified 19 items that needed immediate correction to meet the accreditation requirement of the Fire and Life Safety Codes, and seven items that needed correction to maintain a safe environment for patients, staff, and visitors not covered under those codes. The cost of repairing these deficiencies was determined to be $140,504 and $1,481,415 respectively. A member of my staff prepared a chart of the deficiencies identified in the Deep Look Survey for business purposes only and not for purposes of this litigation. A true and correct copy of the chart is attached to the Motion for Summary Judgment as Exhibit 29. In addition, the hospital quarters fell into further disrepair as facilities staff was limited to performing only urgently needed work. The Tribes were only able to begin to address these problems when they received full funding in fiscal year 1998.

18. Due to the lack of funding for administration of the hospital, the Tribes were unable to develop and implement many of the personnel, purchasing, billing, training, monitoring, computer, and systems necessary for efficient management.

19. Other adverse impacts of IHS's failure to provide the contracted-for funds are described in the accompanying affidavit of Tribal Health Administrator Walden Townsend (Exhibit 17).

20. Before initiating this lawsuit, the Tribes attempted to recover the contract support costs promised but not paid by the IHS, by filing claims for them under the Contract Disputes Act. As Finance Director, I was directly involved in preparing these claims. (True and correct copies of the certified claim letters, without their exhibits, accompany Plaintiffs' Motion as Exhibits 34 and 35.) Unfortunately, IHS did not issue a decision on either claim within the statutory deadline, effectively denying them, and it has been necessary for the Tribes to file this action to recover the amounts due.

DATED this 20th day of July, 1999.

/s/ Winona L. Manning
WINONA L. MANNING

SUBSCRIBED AND SWORN TO before me this 20th day of July, 1999.

/s/ Helen L. Hernandez
HELEN L. HERNANDEZ
Notary Public in and for the State of Idaho
My Commission Expires: 09-04-2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 99-092-S CIV

CHEROKEE NATION OF OKLAHOMA; and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

DONNA E. SHALALA, Secretary of the United States Department of Health and Human Services; and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,
Defendants.

STATE OF NEVADA)
) ss.
COUNTY OF ELKO)

AFFIDAVIT OF WALDEN TOWNSEND

I, Walden Townsend, being first duly sworn, depose and state as follows:

1. I am the Owyhee Community Health Facility Tribal Health Administrator for the Shoshone-Paiute Tribes of the Duck Valley Reservation, and have held that position since January 12, 1998. I am a tribal member, and have been employed by the Tribes in various positions since June 17, 1991.

2. As Tribal Health Administrator, I have detailed personal knowledge of the Tribes' operation, since January 1998, of the various IHS programs operated under the Tribes' Compact of Self-Governance with the United States.

3. The Tribes currently deliver an array of health services to a Service Unit Area population of about 4,000 people located on the reservation, in a long-term BIA detention center located on the reservation, and in surrounding communities and ranches. These programs include inpatient services, medical and behavioral clinical services, preventive health services, dental services, emergency services, laboratory services, pharmacy services, dietary services, and "contract health" services, which are services provided through contracts with private sector health care providers. In addition, the Tribes provide support services, including medical records services, property and supply services, housekeeping, facilities management, and general hospital administration.

4. These health programs are administered through the Business Council, which appoints the Tribal Health Administrator. The Tribal Health Administrator is responsible for making policy and operating decisions through the authority of the Hospital Governing Body. A Board of Health and Human Services, made up of representatives of the service population, including non-IHS beneficiaries, performs an advisory function.

5. The hospital provides inpatient services 24 hours a day, seven days a week, and averages 10 to 15 discharges per month and about 30 to 40 inpatient days per month. Common diagnoses include cardiac-related illnesses, such as congestive heart failure, pneumonia, and alcohol dependence. In addition, the inpatient unit provides some long-term care and monitoring of emergency obstetrical services. (Most deliveries are referred to the hospital at Mountain Home Air Force Base, Idaho.) The inpatient unit is staffed by the

facility's three physicians and 11 nurses depending on need. (Generally, the same staff serves inpatients and outpatients.)

6. The outpatient clinic offers service during normal business hours, and averages about 1,000 visits per month. Common diagnoses include diabetes, hypertensive disease, rheumatology and allergies, along with a range of general medical evaluations and procedures. Staffing consists of three physicians, one physician's assistant, 11 nurses, and four nurse aides.

7. The behavioral clinic offers services during normal business hours and after hours through an on-call schedule, and averages about 200 visits per month. The clinic provides individual and group counseling and alcohol and drug treatment (not involving detoxication). The clinic also provides social work services, integrated throughout with the services provided at the hospital. Common diagnoses include depression, substance abuse, domestic violence, child abuse, and juvenile delinquency. This unit is staffed by a clinical psychologist, a medical social worker, mental health technician, two alcohol and drug abuse counselors, and four employees providing social services. The Tribes contract with a psychiatrist to supplement the Hospital's mental health services.

8. Preventive Health Services primarily involves field visits and education. It is currently staffed by a home health nurse, two community health representatives, and one home health aide. The unit averages 50 visits per month to home-bound patients and those needing transportation, monitoring, post-operative care, and other types of care. The Tribes are also seeking to hire a public health nurse.

9. The dental clinic has two chairs and averages about 200 visits a month. It is staffed by one dentist and two dental assistants. Treatment provided includes prophylaxis, restoration, extraction, non-surgical periodontics, crowns,

dentures and minor tooth movement. Although the incidence of cavities and other dental problems is much higher on the reservation than among the general population, the facility only has the capacity to provide limited routine care for adults.

10. The Tribes are the only provider of medical services within a nearly-100-mile radius, including a considerable length of public highway and many isolated ranches. As such, the Tribes provide emergency services at all times, with physician and other staffing provided through call back. On average, the facility receives about 80 emergency visits per month. The Tribes employ the equivalent of about five full-time emergency medical technicians and maintain three emergency vehicles. After patients are stabilized, they are generally transported to other facilities.

11. Radiology services offers conventional radiological exams at all times through a radiologic technologist and two medical technologists (who also provide lab services), with a rotating on-call schedule. The unit averages about 40 patients per month.

12. Laboratory services are provided by a staff of two medical technologists, who perform 25,000 to 50,000 individual tests per year. Testing is also performed through contract services as necessary. Testing is available at all times through an on-call schedule.

13. The pharmacy averages 1,000 visits per month. The pharmacy is staffed by a pharmacist and two assistants.

14. Dietary services includes meals to inpatients and about 40 outpatient diabetic patients. It is staffed by two full-time cooks, an intermittent cook and a contract dietician.

15. The Tribes also provide senior services under the health program (approximately one-half of this program is funded through IHS). This program, by providing assistance

with chores services and about 60 meals a day, allows older residents to stay at home with their families rather than go away to live in nursing homes in distant communities. The senior program is staffed by a director, cook, four chore workers, a janitor, a driver and kitchen helpers.

16. The contract health services program is administered under the Managed Care unit. It administers payment for services provided by other providers and facilities, including the transfer of emergency medical services not available at the hospital. In accomplishing this task, the program negotiates contracts with providers to limit costs. Contract facilities include hospitals in Battle Mountain, Ely, and Elko, Nevada; Salt Lake City, Utah; Boise and Mountain Home Air Force Base, Idaho; and the Phoenix Indian Medical Center in Phoenix, Arizona.

17. In addition to contract health services, the Managed Care unit provides billing, collection and accounting services for all services rendered at the Owyhee hospital. This includes billing private insurance where available, as well as Medicare and Medicaid for eligible patients. Staffing for the unit includes seven full-time employees.

18. Medical information services, which includes managing patient records, healthcare databases, and security systems under a host of legal and internal requirements, is provided by five employees, including a medical records administration specialist, two medical records technicians, and two medical records clerks.

19. The medical services provided by the Tribes' health program are supported by property acquisition services (two full-time employees), housekeeping services (six employees), and facilities management services (five full-time employees).

20. Four full-time administrators and two secretaries provide the health program with the technical and advisory

support needed to meet procedural, legal and administrative requirements. These administrator's duties include recruitment and staffing, classification and pay administration, employee and labor relations, and general management, training and development of employees.

21. These health programs have been adversely impacted by the funding shortfall resulting from the IHS s failure to pay contract support costs in FY 1996 and FY 1997. For example, with respect to contact health services (that is, services that the Tribes are unable to provide and so must refer to other providers), the funding shortfall required the Tribes to provide only for "Level I Medical Priority Care." Level I includes only "Emergent/Acutely Urgent Care Services" such as emergency room care, emergency psychiatric care involving suicidal persons, and services and procedures necessary for the evaluation of potentially life threatening illnesses or conditions.

22. The lack of funding has also prevented the Tribes from replacing many items as scheduled, so that they are being kept in service past their replacement date. Most significantly, these included 35 medical items. The most expensive item is the hospital's 18-year-old x-ray machine, which would cost more than $200,000 to replace on the open market. In addition, the Tribes have been unable to establish reserves to prepare for the replacement of major items in the future.

DATED this 20 day of July, 1999

/s/ Walden Townsend
WALDEN TOWNSEND

SUSCRIBED AND SWORN TO before me this 20th day of July, 1999.

[NOTARY SEAL]

/s/ Helen Hernandez
HELEN HERNANDEZ
Notary Public in and for the State of Idaho
My Commission Expires: 09-04-2004

COMPACT OF SELF-GOVERNANCE
between the
DUCK VALLEY SHOSHONE PAIUTE TRIBES
and the
UNITED STATES OF AMERICA
October 1, 1994,
as amended October 1, 1995

SHOSHONE PAIUTE TRIBAL HEALTH COMPACT

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TITLE	1
INTRODUCTION	1
ARTICLE I—Authority and Purpose	4
Section 1—Authority	4
Section 2—Purpose	5
ARTICLE II—Terms, Provisions and Conditions	6
Section 1—Term and Resolutions	6
Section 2—Effective Date	7
Section 3—Funding Amount	7
Section 4—Payment	7
Section 5—Reports to Congress	8
Section 6—Audits	8
Section 7—Records	9
Section 8—Property	10
Section 9—Regulatory Authority	11
Section 10—Disputes	13
Section 11—Retrocession and Discontinuance	14
Section 12—Successor Annual Funding Agreements	14

Section 13—Annual Evaluation, Baseline Measurements And Evaluation Criteria 15
Section 14—Secretarial Approval 15
Section 15—Transportation 16

ARTICLE III—Obligations of The Tribes 16

Section 1—Consolidation 16
Section 2—Amount of Funds 17
Section 3—Compact Programs 17
Section 4—Eligibility for Services 17
Section 5—Reallocation 17
Section 6—Merging with Other Programs 18
Section 7—Program Income, Including Medicare/Medicaid 18
Section 8—Carry-Over 18

ARTICLE IV—Obligations of the United States 18

Section 1—Trust Responsibility 18
Section 2—Programs Retained 19
Section 3—Financial and Other Information 20
Section 4—Termination of the Demonstration Project 20

ARTICLE V—Other Provisions 21

Section 1—Designated Officials/Agent 21
Section 2—Indian Preference in Employment, Contracting and Sub-Contracting 22
Section 3—Federal Tort Claims Act Coverage; Insurance 22
Section 4—Compact Modifications or Amendments 23
Section 5—Construction 23
Section 6—Officials Not To Benefit 23
Section 7—Covenant Against Contingent Fees 23
Section 8—Penalties 23
Section 9—Use of Federal Employees 24
Section 10—Extraordinary or Unforeseen Events 24

Section 11—Mature Contractor Upon Compact Termination 24
Section 12—Startup Costs 25
Section 13—Contracting Rights 25
Section 14—Sovereign Immunity 25
Section 15—Interpretation of Federal Law 25
Section 16—Effect on Non-Compacting Tribes 25
Section 17—Inadequacy of Program Funding 25
Section 18—Disasters and Tail Liability 25
Section 19—Severability 26

ARTICLE VI—Attachments 27

Section 1—Approval Of Compact 27
Section 2—Presidential Memorandum 27
Section 3—Annual Funding Agreements 27
Section 4—OMB Letter 27
Section 5—Federal Tort Claims Act 27

ARTICLE VII—Counterpart Signatures 28

TRIBAL HEALTH COMPACT
Between The
DUCK VALLEY SHOSHONE PAIUTE TRIBES
and the
UNITED STATES OF AMERICA
October 1, 1994,
as amended October 1, 1995

This Compact of Self-Governance, under Title III of Public Law No. 93-638, as amended, is made and entered into by and between the Secretary of Health and Human Services, of the United States of America, represented by the Director of the Indian Health Service, and the Shoshone Paiute Tribes of the Duck Valley Reservation. This Compact is entered into under the Self-Governance Demonstration Project which authorizes the Secretary to enter into Compacts and Annual Funding Agreements with the governing bodies of participating Tribal governments. The Secretary has delegated the authority to enter into this compact and the related annual funding agreement to the Director, Indian Health Service (IHS).

WITNESSETH:

WHEREAS, the Congress has declared its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, American Indian Tribes and American Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the federal domination of programs for, and services to, American Indian Tribes and individual Indians to effective and

meaningful participation by the Tribes and Indian people in the planning, conduct, and administration of those programs and services, 25 U.S.C. § 450a(b);

WHEREAS, the Congress has declared its commitment to supporting and assisting American Indian Tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities, 25 U.S.C. § 450a(b);

WHEREAS, Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian Tribes and Indian people, 25 U.S.C. § 1601(a);

WHEREAS, the Congress has declared that it is the policy of the United States, in fulfillment of its special responsibilities and legal obligations to American Indian Tribes and Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary to effect that policy, 25 U.S.C. § 1602(a);

WHEREAS, in furtherance of the federal policy of tribal self-determination, Congress has directed the Secretary of Health and Human Services (hereinafter the "Secretary") to conduct a demonstration project known as the Tribal Self-Governance Project under Title III of the Indian Self-Determination and Education Assistance Act, P.L. 100-472, as amended, (hereinafter "Title III");

WHEREAS, Congress, in Title III, has authorized the Secretary to negotiate and implement a Compact of Self-Governance and Annual Funding Agreements with the governing bodies of participating Tribal governments of qualified American Indian Tribes;

WHEREAS, Congress has directed that the Annual Funding Agreements, which the Secretary negotiates with Tribes, shall authorize the Tribes to plan, conduct, consolidate, administer, redesign, and reallocate funds for programs, services and functions of the Indian Health Service as specified in § 303(a) of Title III;

WHEREAS, each Annual Funding Agreement shall specify the services to be provided, the functions to be performed, and the responsibilities of the Tribe and the Secretary pursuant to the Agreement, § 303(a)(4) of Title III;

WHEREAS, the Annual Funding Agreement shall specify the authority of the Tribe and the Secretary, and the procedures to be used, to reallocate funds or modify budget allocations within any project year, § 303(a)(5) of Title III;

WHEREAS, for the year for which, and to the extent to which, funding is provided to a compacting Tribe, pursuant to an Annual Funding Agreement, the Tribe shall be responsible for administration of programs, services and activities pursuant to the Agreement, consistent with § 303(b)(2) of Title III;

WHEREAS, nothing in this Compact or associated Annual Funding Agreement shall be construed to limit or reduce in any way the services, contracts or funds that any other Indian Tribe or tribal organization is eligible to receive under § 102, [25 U.S.C. § 450f], or any other applicable Federal law, § 306 of Title III;

WHEREAS, Congress has, in Title III, directed that the Annual Funding Agreements, which the Secretary negotiates with Indian Tribes shall contain certain provisions and, at the option of the Tribes, apply to certain programs, activities, functions and services of the Indian Health Service (including certain construction) as specified in § 303(a) of Title III;

WHEREAS, Congress has directed that, at the request of the governing body of qualifying Tribes and under the terms

of an Annual Funding Agreement, the Secretary shall provide funding to the Tribes to implement the Annual Funding Agreement, § 303(c) of Title III;

WHEREAS, Congress has directed that, to the extent feasible, the Secretary shall interpret federal laws and regulations in a manner that will facilitate a Compact of Self-Governance and Annual Funding Agreement authorized by § 303(e) of Title III;

WHEREAS, Congress has directed that, to the extent feasible, the Secretary shall interpret federal laws and regulations in a manner that will facilitate the inclusion of activities, programs, services, and functions in the agreements authorized by § 303(f) of Title III;

WHEREAS, the parties have determined that all of the provisions of this Compact are authorized by Title III or other provisions of federal law and the parties have executed this Compact in reliance on this representation;

Now, THEREFORE, the Secretary and the Shoshone Paiute Tribes do hereby agree to enter into, undertake, and be bound by this Compact in accordance with the foregoing principles.

ARTICLE I—AUTHORITY AND PURPOSE

Section 1—Authority. This Compact of Self-Governance (hereinafter referred to as the "Compact"), is authorized by Title III of the Indian Self-Determination and Education Assistance Act, hereby entered into by the Secretary of the Department of Health and Human Services of the United States of America (hereinafter referred to as the "Secretary"), represented by the Director of the Indian Health Service, and the Shoshone Paiute Tribes. The Director of the Indian Health Service by signing this Compact commits the Secretary to the extent and within the scope of the Secretary's delegation of authority to enter into an Annual Funding Agreement pursuant to Title III or as otherwise authorized.

Section 2—Purpose. This Compact shall be liberally construed to achieve its purposes:

(a) This Compact is to carry out an unprecedented Self-Governance Demonstration Project, which is intended as a demonstration in the areas of health planning, funding and program operations within the government-to-government relationship between the Tribes and the United States. The Demonstration Project encourages innovation in order to determine how to improve this government-to-government relationship and promote the autonomy of the Tribes in the realm of health care.

(b) This Compact is to enable the Tribes to re-design health programs, activities, functions, and services of the Indian Health Service; to reallocate funds for such programs, activities, functions, or services according to the priorities of the Tribes; to provide such reallocated funds for such programs, activities, functions, or services according to its priorities; to provide such programs, activities, functions, and services, as determined by such priorities; to enhance the effectiveness and long-term financial stability of the Tribes; and to streamline the federal Indian Health Service bureaucracy.

(c) This Compact is to enable the United States to maintain and improve its unique and continuing relationship with and responsibility to the Tribes through the establishment of a meaningful demonstration project for tribal self governance and to permit an orderly transition from federal domination of programs and services. This Compact and Annual Funding Agreement shall transfer to the Tribes the responsibility for the programs, activities, functions and services of the Indian Health Service included in the Annual Funding Agreement. This Compact allows the Tribes to exercise authority to plan, conduct, and administer those programs and services to meet the health care needs of the Tribes. In fulfilling its responsibilities under the Compact and consistent

with the April 29, 1994, Memorandum from the President of the United States of America for the Heads of Executive Departments and Agencies, attached hereto as Exhibit B, the Secretary hereby pledges that the Indian Health Service will conduct all relations with the Tribes on a government- to-government basis.

Section 3—Tribal Law and Forums. The duly enacted laws of the Tribes shall be applied in the execution of this Compact and the powers and decisions of the Tribes' Court shall be respected to the extent that federal law, construed in accordance with the applicable canons of construction and Title III of the Indian Self-Determination Act, as amended, is not inconsistent. This shall not be construed as a waiver of federal sovereign immunity, or that of the Tribes', but shall govern disputes between tribal members, or other persons, and the Tribes regarding programs, services, functions and activities under the Compact and related Annual Funding Agreement.

ARTICLE II—TERMS, PROVISIONS AND CONDITIONS

Section 1—Term and Resolutions.

(a) Term. The term of this Compact begins on the effective date of the Tribes' first Annual Funding Agreement for Fiscal Year 1995, and shall extend thereafter as to the Tribes throughout the period authorized by Title III of the Indian Self-Determination and Education Assistance Act, and any subsequent amendment thereto, provided the Tribes have an Annual Funding Agreement in effect, and shall be subject to renewal as may be provided by law and approved by the Tribes.

(b) Resolution. The Tribes shall enter into a resolution authorizing the Chairman, on behalf of the Tribes, to enter into this Compact and Annual Funding Agreement.

Section 2—Effective Date.

(a) Once this Compact and the Annual Funding Agreement, attached hereto as Exhibit C, are approved and signed by the Tribes and the Secretary, they shall be forthwith submitted by the Secretary to the Committee on Indian Affairs of the United States Senate, and the Committee on Natural Resources of the United States House of Representatives, and shall be effective ninety days after such submission, unless otherwise provided by law.

(b) All successor Annual Funding Agreements shall be subject to, and all the activities thereunder shall be governed by, the terms of this Compact to the same extent as the initial Annual Funding Agreement Successor Annual Funding Agreements shall be submitted in the same manner in subsequent years while the Compact remains in effect.

(c) Each Annual Funding Agreement and successor Annual Funding Agreement is deemed to be incorporated, as negotiated, by reference into this Compact. In the event of inconsistency between the Compact and any successor Annual Funding Agreement, the provisions of the Compact shall prevail.

Section 3—Funding Amount. Subject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to § 106(b) of the Indian Self-Determination and Education Assistance Act, as amended, the Secretary shall provide the total amounts specified in the Annual Funding Agreement.

Section 4—Payment.

(a) Payment Schedule. Payment shall be made as expeditiously as possible and shall include financial arrangements to cover funding during periods under continuing resolutions to the extent permitted by such resolutions. For each fiscal year covered by the Compact, the Secretary shall make available

the funds specified for that fiscal year under the Annual Funding Agreement by paying the respective total amount as provided for in each Annual Funding Agreement in advance lump sum, unless otherwise provided in a schedule set forth in the Annual Funding Agreement. The first payment shall be made on or before ten calendar days after the date on which the Office of Management and Budget apportions the appropriations for that fiscal year for the programs, activities, functions and services subject to the Compact.

(b) Interest on Advances. The Tribes shall be permitted to retain interest earned on funds advanced pending disbursement as authorized by law. Interest earned on advances shall not diminish the amount of funds the Tribes are authorized to receive under the Annual Funding Agreement in the year earned or in any subsequent fiscal year.

(c) Interest on Late Payments. The Tribes shall be entitled to interest on late payments for all sums due the Tribes under this Compact and any Annual Funding Agreement as specified in the Prompt Payment Act to the extent not contrary to law.

(d) Carryover. Amounts made available pursuant to this Compact and associated Annual Funding Agreements shall remain available for expenditure without fiscal year limitation.

(e) Limitation of costs.—The Tribes shall not be obligated to continue activities that require an expenditure of funds for a program in excess of the amount of funds awarded under an Annual Funding Agreement for such program. If, at any time, the Tribes have reason to believe that the total amount required for performance of an Annual Funding Agreement or a specific activity conducted under such an Agreement would be greater than the amount of funds awarded under the Agreement, the Tribes shall provide reasonable notice to the Secretary. If the Secretary does not take

such action as may be necessary to increase the amount of funds awarded under the Annual Funding Agreement, the Tribes may suspend activities until such time as additional funds are awarded.

Section 5—Reports to Congress. In accordance with § 305 of Title III, the Secretary shall submit to the Congress a written report on July 1 and January 1 of each of the five years following the date of enactment of Title III on the relative costs and benefits of the Tribal Self-Governance Project. Such report shall be based on mutually determined baseline measurements jointly developed by the Secretary and the Tribes and shall separately include the views of the Tribes.

Section 6—Audits

(a) The Tribes shall provide to the Designated Official of the Secretary (as defined in Article V, Section 1) an annual single organization-wide audit as prescribed by the Single Audit Act of 1984, 31 U.S.C. § 7501, *et seq.*, and shall adhere to generally accepted accounting principles and the applicable Circulars of the Office of Management and Budget (hereinafter "OMB"). A copy of this audit will be sent simultaneously to the Indian Health Service and the cognizant agency.

(b) For the term of this demonstration project, all provisions contained in the letter dated July 16, 1991, from the Office of Management and Budget (OMB) to the Department of Interior, attached hereto as Exhibit D, may be relied upon by the Tribes. The Tribes shall apply cost principles under the applicable OMB Circular, except as modified by the July 16, 1991, OMB Letter, by the provisions of section 106(k) of the Indian Self-Determination Act, as amended, and by any exemptions subsequently granted by OMB. The Secretary will assist the Tribes in obtaining such additional waivers from OMB as are requested by the Tribes. No other audit or accounting standards shall be required by the Secretary. Any

claim by the Federal Government against the Tribes shall be subject to the provisions of § 106(f) of the Indian Self-Determination and Education Assistance Act, as amended.

Section 7—Records. The following provisions supplement tribal law on document disclosure and govern record keeping associated with the Compact.

(a) The Tribes shall maintain a record keeping system and provide the IHS reasonable access to records which permits the IHS to meet its minimal record-keeping requirements under the Federal Records Act, 44 U.S.C. 1301 et. seq., or which are needed in the event of a retrocession under this Compact or any associated Annual Funding Agreement.

(b) Tribal records which the Director demonstrates are required by law to be maintained as part of the IHS system of records shall be deemed Federal records, and shall be subject to the Privacy Act, 5 U.S.C. 552a et. seq., but shall not be subject to disclosure under the Freedom of Information Act, 5 U.S.C. 552, as applicable.

(c) The Tribes shall maintain in their record keeping system all documents necessary for the annual audit requirement in Section 5 of Article I, and shall provide reasonable access to such records to the IHS for such purposes.

Section 8—Property.

(a) At the request of the Tribes, the Secretary or an authorized representative shall to the extent permissible by federal regulation or law and utilizing the Title I of P.L. 93-638 process make available and/or transfer title to the Tribes reasonably divisible real property, facilities, equipment, and personal property that the Department had previously utilized to provide the program, activities, functions and services consolidated by the Tribes in accordance with the provisions of this Compact. A list agreed upon by the Secretary and the Tribes specifying the property, facilities, and equipment so

made available shall also be prepared and periodically revised.

(b) The Tribes shall have the authority to acquire such "excess" and "surplus" property as may be appropriate in the judgment of the Tribes to support the programs, activities, functions, and services designated in the Tribes' Annual Funding Agreement. The Secretary, or an authorized representative, agrees to make her best efforts to assist the Tribes in obtaining such surplus, confiscated or excess property as may become available to Indian Tribes or local governments. A Screener Identification Card (General Services Administration Form 2946) shall be issued to the Tribes no later than the effective date of this Compact. The Designated Official upon request shall assist the Tribes in securing the use of this Card.

(c) The Tribes will determine what capital equipment, leases, rentals, property or services, they will require to perform their obligations under this Compact, and will acquire, and maintain records of, such capital equipment, property rentals, leases, property or services through their own internal procurement procedures.

(d) Management of property under this Compact will be in accordance with the Tribes' internal property management procedures.

(e) Upon request of the Tribes, the Secretary shall enter into a lease with the Tribes in accordance with section 105(1) of the Indian Self-Determination Act, as amended.

Section 9—Regulatory Authority. The Secretary and the Tribes agree to utilize the following procedures governing the establishment and application of program, rules and regulations under this Compact:

(a) Program Rules. The Tribes shall not be required to comply with federal program guidelines, manuals, or policy directives other than those identified in this section or in the

Tribes' Annual Funding Agreement in carrying out the programs, services, activities and functions under the Compact.

(b) Federal Regulations.

(1) Applicable Federal Regulations. The Tribes, in carrying out the provisions of this Compact and the Annual Funding Agreement, will be required to comply only with applicable federal regulations. To the extent that any section of Title I of the Indian Self-Determination Act, as amended, is, by its own terms or in some other manner made applicable to compacts under Title III, regulations promulgated pursuant to section 107 of the Act to implement such section are considered "applicable" federal regulations.

(2) Waiver of Federal Regulations.

(A) The Secretary and the Tribes will seek to identify any federal regulations which may require waiver in order to effectively carry out the Annual Funding Agreement. Any applicable regulations promulgated under section 107 are subject to the special exception and waiver provisions contained in section 107(e) of the Indian Self-Determination Act, as amended.

(B) The Secretary agrees to assist the Tribes in obtaining, from the appropriate office within or outside the Department of Health and Human Services, waivers of regulations in accord with the following process:

(i) If the Tribes decide that a regulation should be waived such request must be submitted in writing to the Director, Office of Tribal Self-Governance (OTSG). The request shall indicate that the Tribes have researched the matter carefully and made their best determination concerning what exactly needs to be waived. The request should also contain alternative methods of dealing with the matter, if applicable, or justify why no alternative methods will be sufficient. If nonprivileged legal research has been

done on the matter, this should be included in the waiver request to expedite the review process. When requesting a waiver the Tribes are encouraged to discuss the matter with the Director, OTSG, and other federal officials as appropriate, prior to filing the request in order to explore options under existing law and regulation and to aid in expediting the request.

(ii) After the request is submitted to and received by the Director, OTSG, acknowledgement of receipt will be made in writing. The request shall be reviewed to determine the following:

(a) What department, agency or component thereof, if any, has authority to grant the waiver?

(b) Which Indian Health Service programs, activities, functions or services are involved and what is the Indian Health Service input on the matter? For example, will granting the waiver have an impact on a portion of such program, activity, function or service which remains with the Indian Health Service?

(c) What are the policy implications of the request for the Indian Health Service?

(iii) At a minimum, this review would involve receiving input form the Office of General Counsel, and the appropriate program offices of the Indian Health Service.

(iv) The Director, OTSG, shall, within 30 days of receipt, forward the request, through appropriate channels, along with the Director's recommendations, to the appropriate department, agency or component having authority to grant or deny the request. A copy of the recommendations of the Director, OTSG, shall also be sent to the Tribes. The Director, OTSG, shall, to the extent consistent with his or her review of the request, recommend to such agency or component that the request be granted in an expeditious

manner and shall report to the Tribes on the status of the request at 30 day intervals until a decision is reached. The Director, OTSG, shall make every effort to secure a decision on the request within a reasonable period of time.

Section 10—Disputes.

(a) All disputes between the Indian Health Service and the Tribes shall be subject to the provisions of § 110 of the Indian Self-Determination and Education Assistance Act, as amended, and all remedies provided for therein shall be available to the Tribes. Actions and proceedings to enforce the Tribes' rights and the Secretary's obligations under this Compact shall be subject to the Equal Access to Justice Act, Public Law 96-481, as amended, to the same extent as are actions and proceedings involving Public Law 93-638 contracts.

(b) In the alternative, the Indian Health Service and the Tribes may use the processes authorized and encouraged in the Administrative Dispute Resolution Act, 5 U.S.C. § 571 note, for more informal resolution of disputes arising under this Compact and associated Annual Funding Agreement.

Section 11—Retrocession.

(a) The retrocession provisions of Section 105(e) of the Act, as amended, are herein adopted.

(b) The parties agree that the funds which the Tribes have remaining unexpended at the time of a retrocession shall be made available to the Secretary to provide services for those programs retroceded to the IHS pursuant to this clause.

(c) In the event of a retrocession, nothing in this Compact shall be construed as preventing the Tribes from submitting a proposal for a grant or contract under Title I of the Act to operate any of the programs, functions or services governed by this Compact and Annual Funding Agreement.

In such event, the Tribes shall maintain their mature contractor status.

(d) At the Tribes' option, the Tribes may elect to retrocede only a portion of the programs, functions, services or activities undertaken under this Compact and the associated Annual Funding Agreement. In that instance, the amount of funds and the property remaining in the Tribes' possession for purposes of carrying out the programs, functions, services or activities retroceded shall be returned to the Secretary under this retrocession procedure.

Section 12—Successor Annual Funding Agreements.

(a) Negotiations for a successor Annual Funding Agreement, as provided for in Article VI, Section 2, shall begin no later than 150 days in advance of the conclusion of the preceding Annual Funding Agreement. Pursuant to § 301 and § 303(a) of the Indian Self-Determination and Education Assistance Act, as amended, the Secretary shall make his or her best efforts to continue and promote this demonstration project in preparing budgets for subsequent years. The Tribes are hereby assured that future funding of the Tribes' successor Annual Funding Agreement shall only be reduced pursuant to the provisions of § 106(b) of the Indian Self-Determination and Education Assistance Act, as amended, provided, however that future funding for the Tribes' non-recurring funds and tribal shares shall be subject to adjustments in accordance with a yearly reallocation decision by the Tribes. The Secretary agrees to prepare and supply relevant information, and promptly to comply with the Tribes' requests for information reasonably needed to determine the funds that may be available for a successor Annual Funding Agreement as provided for in Article VI, Section 2 of this Compact.

(b) If the parties are unable to conclude negotiation of a successor Annual Funding Agreement, the terms of this

Compact and the existing Annual Funding Agreement shall, at the option of the Tribes, continue on in 30 to 90 day increments until a successor Annual Funding Agreement is agreed to. Any increases in funding to which the Tribes are entitled by statute, or increases which the Tribes subsequently negotiate, shall be included in the successor Annual Funding Agreement.

Section 13— Annual Evaluation, Baseline Measurements and Evaluation Criteria. Annual evaluations of the programs, activities, functions and services under this Compact and the Annual Funding Agreement shall be conducted in accordance with baseline measures, which shall include the procedures and criteria for conducting the evaluation and which shall be negotiated between the Secretary and the Tribes.

Section 14— Secretarial Approval. For the term of the Compact, the provisions of 25 U.S.C. § 81 and 25 U.S.C. § 476 shall not apply to attorney and other professional contracts of the Tribes.

Section 15— Transportation.

(a) Use of Motor Vehicles. The Secretary hereby authorizes the Tribes to obtain Interagency Motor Pool vehicles and related services for performance of any programs, activities, functions and services under this Compact.

(b) Use of Other Transportation Services. The Tribes, and their employees, operating under this Compact, and while carrying out an applicable Annual Funding Agreement, shall be able to use discounts and special fares negotiated by the Federal Government with private entities, including airlines and other common carriers, to the same extent those discounts and special fares are available to the Federal Government. The foregoing shall be in accordance with section 105(k) of the Indian Self-Determination Act, as amended.

ARTICLE III—OBLIGATIONS OF THE TRIBES

Section 1— Consolidation. The Tribes shall be responsible for performing the health programs, activities, functions and services as specified in Section 3 of this Article III and in their respective Annual Funding Agreement, as provided for in Article VI, Section 2 of this Compact. To the extent a program, activity, function, or service included within a contract or grant entered into pursuant to §§ 102 or 103 of the Indian Self-Determination and Education Assistance Act, as amended, is included within an Annual Funding Agreement, that contract or grant shall be modified or terminated as appropriate. The parties' obligations shall be governed by this Compact and all funds previously obligated under contracts or grants (including carry-over funds) may be re-obligated to the Tribes under the applicable Annual Funding Agreement. Such terminated contracts shall be identified by contract number in the Annual Funding Agreement.

Section 2— Amount of Funds. The total amount of funds covered by the consolidation and redesign provided for in Section 1 of this Article that the Secretary shall make available to the Tribes shall be determined in accordance with § 303(a)(6) of Title III and shall be set forth in the respective Annual Funding Agreement between the Secretary and the Tribes.

Section 3— Compact Programs. The health programs, activities, functions and services identified in the Tribes' Annual Funding Agreement will be the responsibility of the Tribes under this Compact.

Section 4— Eligibility for Services. In determining eligibility for services, the Tribes shall comply with applicable eligibility provisions set forth in the Indian Health Care Improvement Act, as amended, applicable regulations, and other statutory law.

Section 5— Reallocation. Reallocation of funds to other health programs, activities, functions, or services shall not require Secretarial consent, except that the use of funds pursuant to this Compact shall be subject to specific directives or limitations as may be included in applicable appropriations Acts. In addition, funds may not be transferred from one Indian Health Service appropriations account to another. (Specifically, funds from Indian Health Service's services accounts may not be used for purposes for which funds in the Indian Health Service's facilities accounts are appropriated, and vice versa, except as authorized by law.) Funds may be used to meet matching and other cost participation requirements under other federal, state and other health programs, where not prohibited by statute.

Section 6— Merging with Other Programs. The Tribes may merge programs, activities, functions and services provided under their Annual Funding Agreement with other health programs, activities, functions and services provided with their own funds or funds from other sources. In such cases, the Tribes shall not be required to separate dollars or programs, activities, functions and services so long as the Tribes can provide sufficient data to permit an acceptable program and financial audit to be conducted.

Section 7— Program Income, including Medicare /Medicaid. All Medicare Medicaid or other program income received by a Tribes shall be treated as additional supplemental funding to that negotiated in the Annual Funding Agreement and the Tribes may retain all such income, including Medicare/Medicaid, and expend such funds in the current year or in future years, nor shall such funds result in any off-set or reduction in the negotiated amount of the Annual Funding Agreement. Medicare/Medicaid collections of a Tribes under Title IV of Public Law 94-437, as amended, shall be used by the Tribes in accordance with any applicable statutory restrictions on the use of such funds.

Section 8— Carry-over. Congressionally appropriated funds allocated in accordance with an Annual Funding Agreement under this Compact are "no year" funds and may be expended by the Tribes in accordance with their budget for the year for which the funds are appropriated or carried over and expended in any subsequent fiscal year, and such carry-over shall not diminish the amount of funds the Tribes are authorized to receive under their Annual Funding Agreement for any such subsequent fiscal year.

ARTICLE IV— OBLIGATIONS OF THE UNITED STATES

Section 1— Trust Responsibility. Nothing in this Compact waives, modifies, or diminishes in any way the trust responsibility of the United States with respect the Tribes which exists under treaty, executive orders, and acts of Congress.

Section 2— Programs Retained.

(a) The Secretary hereby retains the responsibility for the programs, activities, functions and services with respect to the Tribes that are not specifically assumed by the Tribes through their Annual Funding Agreement and they shall continue to be entitled to the full benefit of those programs, activities, functions, and services retained by the Indian Health Service. The Tribes shalt be eligible for new programs, activities, functions and services of the Secretary and the Indian Health Service on the same basis as other Tribes and Tribal Organizations. The Indian Health Service, in consultation with the Tribes, may reorganize to sustain its ability to provide, in the most effective and efficient manner, all programs, activities, functions, and services that have not been included in the Annual Funding Agreement.

(b) No later than 150-days prior to the end of each fiscal year, the Indian Health Service shall provide the Tribes with a written list of the retained programs, activities, functions, and services relevant to the Shoshone-Paiute Tribes and the Owyhee Service Unit for the upcoming fiscal year.

To the fullest extent permitted by law, the Secretary shall provide the Tribes, upon request, with access to, and copies of, all documents and other information relevant to any ongoing retained programs, activities, functions, or services, and shall cooperate with any evaluation which the Tribes may wish to conduct. The foregoing reports shall include (a) quarterly IHS Status of Allowance reports from Headquarters concerning Phoenix Area allowances, (b) periodic status of allowance reports of the Phoenix Area Office concerning all programs, activities, functions, services and activities comparable to those performed by the Tribes under this Compact, and (c) all revisions to the plans, guidelines or budgets of the Phoenix Area relating to such comparable programs. The Secretary will cooperate with the Tribes to facilitate the inclusion of programs, activities, functions and services in future Annual Funding Agreements of the Tribes.

Section 3— Financial and Other Information.

(a) To assist the Tribes in monitoring compliance with § 303(a)(6) of the Indian Self-Determination and Education Assistance Act, as amended, the Secretary shall provide to the Tribes:

(1) all monthly reports of obligations and allowances, including all reports from Central Office, Headquarters, the Office of Tribal Self-Governance and the Phoenix Area Office, concerning funds provided to support programs, activities, functions and services provided by the Tribes under this Compact and funds retained by the Indian Health Service to support programs, activities, functions and services retained by the Indian Health Service;

(2) revisions in such program plans, guidelines or budgets as they are made; and

(3) prompt notice of any new programs, activities, functions and services for which the Tribes or Tribes are

eligible, including the funding available for such programs, activities, functions and services.

(b) The Secretary shall prepare and promptly supply relevant financial information and comply with the Tribes' request for information needed to determine funds that may be available for a successor Annual Funding Agreement. Such written information shall be provided to the Tribes within 30 days of their request.

Section 4— Termination of the Demonstration Project. Prior to the expiration or termination of the Compact, the Secretary shall, to the extent permitted by law and regulation and at the request of the Tribes, negotiate a contract or contracts under Title I of the Indian Self Determination and Education Assistance Act, as amended, to provide, as requested by the Tribes, all of the programs, activities, functions or services and the resources authorized under Title I.

Section 5— Access to HIS Support Services, Programs and Facilities.

The United States shall maintain the Tribes' eligibility for, and equal access to, all programs, services, functions and activities of the Department and other federal agencies which would otherwise be available to the Director to serve or support the Tribes' service population if the programs, services, functions and activities operated by the Tribes pursuant to this Compact and the attached Annual Funding Agreement were instead operated by the Indian Health Service (including, without intending any limitation, eligibility for special pay, change of station pay, other special benefits available to medical personnel such as recruitment and retention benefits, and all similar benefits).

ARTICLE V— OTHER PROVISIONS

Section 1— Designated Officials/Agent.

(a) Parties. On or before the effective date of this Compact, both the Secretary and the Tribes shall provide a written designation of an individual as their representative/liaison. The Secretary shall direct all communications about the Compact, and relevant Annual Funding Agreement, to the Tribes' designated representative. Reference herein to the Tribes or the Secretary shall include the respective Designated Official thereof.

(b) Agent for Notice. If the Tribes assign an agent to accept and distribute notices, the Tribes shall provide the name and address of the agent and a description of the limited powers and duties of the agent.

Section 2— Indian Preference in Employment, Contracting and Sub-Contracting. Section 7(b) and (c) of the Indian Self-Determination Act, as amended, relating to use of Indian business concerns and Indian preference in training and employment, shall apply to the procurement and employment policies of the Tribes. The parties agree that the Tribes may comply with any Indian preference established by the Tribes, including preference based on tribal affiliation.

Section 3— Federal Tort Claims Act Coverage; Insurance.

(a) The Tribes are deemed by statute to be part of the Public Health Service (PHS), and the employees of the Tribes are deemed by statute to be part of or employed by the Public Health Service, for purposes of coverage under the Federal Tort Claims Act, while performing programs, activities, functions or services under this Compact and any applicable Annual Funding Agreement, including coverage for claims of medical malpractice, as is more fully described in the Indian Self-Determination Memorandum No. 92-1, attached hereto as Exhibit E, incorporated by reference herein. Such coverage

shall be coextensive with the coverage provided Indian tribes under section 314, Pub. L. 101-512 (as amended) and section 102(d) of the Indian Self Determination Act (as amended).

(b) The above status of the Tribes, or an employee's status as an employee of the Tribes, is not affected by the source of the funds used by the Tribes to pay the employee's. salary and benefits as long as the employee does not receive any additional compensation for the performance of covered services from anyone other than the Tribes.

(c) The Tribes' employee may, while performing under this Compact and the Tribes' Annual Funding Agreement and as a condition of employment, be required by the Tribes to provide services to non-Indian Health Service beneficiaries in order to meet the obligations under this Compact either in facilities of the Tribes or in facilities other than those of the Tribes.

(d) Funds provided under an Annual Funding Agreement may be used to purchase such additional liability and other insurance as is prudent in the judgment of the Tribes performing under this Compact and Annual Funding Agreement for their protection and the protection of their employees.

(e) Except as otherwise provided by law, nothing in this Compact shall either enhance or diminish the liability of the United States for any claims arising prior to the effective date of this Compact. In particular, the United States will maintain the Tribes eligibility for Catastrophic Health Emergency Fund (CHEF) money on par with all other Indian Health Service Units and tribal self-determination contract operations and for other catastrophic health care funds as may be available from time to time on a par with all other Indian Health Service Units and tribal self-determination contract operations.

(f) Personal services contracts shall be covered under this provision to the extent authorized under section 102(d) of the Indian Self-Determination Act, as amended.

Section 4— Compact Modifications or Amendments. Any request for a modification of this Compact must be communicated in writing to the Tribes and to the Indian Health Service. To be effective any modifications of this Compact shall be in the form of a written amendment to the Compact, and shall require written consent of the Tribes, acting directly or through an agent authorized by resolution, and the Secretary.

Section 5—Construction. To the extent permitted by law, and according to the terms of applicable appropriations acts and other relevant authority, this Compact shall apply to funds included in the facilities category of Indian Health Service appropriations. Section 7(a) of the Indian Self-Determination Act, as amended, shall apply to any construction activities transferred to the Tribes under this provision.

Section 6— Officials Not To Benefit. No member of or delegate to Congress shall be admitted to any share or part of any Compact executed pursuant to this Compact, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to any contract under this Compact if made with a corporation for its general benefit.

Section 7— Covenant Against Contingent Fees. The parties warrant that no person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this Compact upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Section 8— Penalties. The parties agree that the criminal penalties set forth in 25 U.S.C. § 450d apply to all activities conducted pursuant to this Compact.

Section 9— Use of Federal Employees. Section 104 of the Indian Self-Determination and Education Assistance Act, as amended, shall apply to this Compact and to any individuals assigned or detailed to the Tribes performing functions under this Compact or leaving federal employment to perform services under this Compact, including assign-ments either on detail or on leave without pay and with or without reimbursement by the Tribes for the travel and transportation expenses to or from the place of assignment, and for the pay, or supplemental pay, or any part thereof, of the employee during assignment.

Section 10— Extraordinary or Unforeseen Events. This Compact is intended to obligate the Tribes to carry out all usual and ordinary functions respecting the programs, activities, functions and services that they are undertaking to assume responsibility for under their Annual Funding Agreement. In the event major unforeseen or extraordinary events occur, as jointly identified by the Tribes and the Secretary, with consequences beyond the control of the Tribes, that the Trams shall have access to additional services and funding amounts for their Annual Funding Agreement as described in the Annual Funding Agreement. The parties will seek to ensure that funds available to the Tribes to deal with the unforeseen circumstance will not be less than would have been available to non-Compact Tribes or the Indian Health Service had they encountered a similar circumstance. The Tribes' participation in the Indian Health Service Catastrophic Funds will be identified in the Tribes' Annual Funding Agreement.

Section 11— Mature Contractor Status upon Compact Termination. Should the Tribes elect to convert all or some of the programs operated under the Compact back to contract

status under Public Law 93-638, such conversion shall not affect the Tribes' status as a Mature Contractor. Such conversion would occur only at the end of the Compact term, on another date mutually acceptable to the Tribes and the Secretary, or as otherwise provided in this Compact, and will be implemented in a manner which avoids any interruption of services to individual tribal members. If the Compact is terminated or the Tribes determine that they will retrocede any program, activity, function or service operated under the Compact, the Tribes shall not lose their Mature Contractor status.

Section 12— Startup Costs. Startup costs may be separately negotiated by the Tribes and if available shall be included in the Tribes' Annual Funding Agreement. Startup costs are designed to compensate the Tribes for costs associated with implementing this Compact which he Tribes would not normally incur. Upon agreement to such costs on an annual basis, funds for such costs shall be included in the Annual Funding Agreement, if available.

Section 13— Contracting Rights. Nothing in this Compact or in any Annual Funding agreement shall be construed to preclude the Tribes from contracting with the Secretary to Perform a program, activity, function, or service under Title I of P.L. 93-638, subject, however, to § 303(b)(1) of Title III.

Section 14— Sovereign Immunity. Nothing in this Compact or in any Annual Funding Agreement shall be construed to affect the sovereign immunity of the Tribes.

Section 15— Interpretation Of Federal Law. In the implementation of this Compact, the Secretary, to the extent feasible, shall interpret federal law and regulations and this Compact in a manner that effectuates and facilitates the purposes of this Compact in accordance with § 303(e) of Title III.

Section 16— Inadequacy of Program Funding. The parties to this Compact understand that the Indian Health Service budget is inadequate to fully meet the special responsibilities and legal obligations of the United States to assure the highest possible health status for American Indians and that, accordingly, the funds provided to the Tribes are inadequate to permit the Tribes to achieve this goal. The Secretary commits to advocate for increases in the Indian Health Service budget to further the ability of the Tribes to provide the full range of services that are the responsibility and obligation of the United States to make available to American Indian people and to meet the goals of the Indian Health Care Improvement Act.

Section 17— Effect on Non-Compacting Tribes.

(a) Nothing in this Compact or associated Annual Funding Agreement shall be construed to limit or reduce in any way the service, contracts or funds that any Indian Tribe or tribal organization is eligible to receive.

Section 18— Disasters and Emergencies. The United States will maintain the Tribes' eligibility for special disaster relief and assistance programs as the same may from time to time become available, and shall retain responsibility to assist the Tribes in responding to natural or other disasters, emergencies, and unforeseen acts of God.

Section 19— Severability.

(a) Except as provided in this section, this Compact shall not be considered invalid, void, or voidable if any section or provision of this Compact is found to be invalid, unlawful or unenforceable by a court of competent jurisdiction.

(b) If any section or provision of this Compact is found to be invalid, unlawful or unenforceable by a court of competent jurisdiction, either party may, at its option, treat this Compact as invalid, void, or voidable, in accordance with the provisions of this Compact.

(c) In the event that the parties decide not to treat the Compact as invalid, void or voidable under subsection (b) of this section, the parties will seek agreement to amend, revise or delete any such invalid, unlawful or unenforceable section or provision, in accordance with the provisions of this Compact.

ARTICLE VI — ATTACHMENTS

Section 1— Approval of Compact. The resolution of the Tribes approving this Compact is attached as Exhibit A.

Section 2— Presidential Memorandum. The April 29, 1994 Memorandum from the President of the United States to the Heads of the Executive Departments and Agencies is attached as Exhibit B.

Section 3— Annual Funding Agreement. The Tribes' Annual Funding Agreement is attached hereto as Exhibit C.

Section 4— OMB Letter. The July 16, 1991 letter from the Office of Management and Budget to the Depart-ment of the Interior is attached as Exhibit D.

Section 5— Federal Tort Claims Act. Indian Self-Determination Memorandum No. 92-1 is attached as Exhibit E.

ARTICLE VII— COUNTERPART SIGNATURES

This Compact may be signed in counterparts:

United States of America

Department of Health
and Human Services

/By/ [Illegible]

Director, Indian Health Service
Date: 6-30-95

SHOSHONE-PAIUTE TRIBES OF THE
DUCK VALLEY RESERVATION

/By/ Renee Rose
Renee Rose, Vice Chairperson for
Lindsey Manning, Chairman

DATE: June 28, 1995

COMPACT OF SELF-GOVERNANCE

between the

DUCK VALLEY SHOSHONE PAIUTE TRIBES

and the

UNITED STATES OF AMERICA

October 1, 1994, as amended October 1, 1995

AMENDMENT NO. 1

The parties hereby agree to add the following section 16 to Article II of the Compact of Self-Governance.

16. Title I Provisions. Pursuant to section 19, Pub. L. 104-109, the following provisions of Pub. L. 93-638, as amended, shall apply to this Compact, and the term "contract" as set forth in those previsions, shall include this Compact and its associated annual funding agreements:

sections 7(b) and (c) (relating to Indian preference and the Tribes' employment and contract preference laws);

section 8 (carryover authority);

section 102(d) (Federal Tort Claims Act protection for claims arising out of the performance of this Compact);

section 103 (tribal grants);

section 104 (use of federal personnel);

section 105(a)(1) (exemption from federal procurement and other contracting laws and regulations);

section 105(f)(property);

section 105(k) (access to federal sources of supply);

section 105(l) (leasing of tribal facilities);

section 105(m) (construction);

section 106(a) (minimum compact funding);

sections 106(b)~~(1) through (5)~~ (prohibitions against funding reductions); [illegible initials]

section 106(c)(2) (contract support deficiency reporting to Congress);

section 106(c)(6) (service level reporting to Congress);

section 106(d) (exemption from adverse adjustment due to shortfalls in recoveries);

section 106(f) (limitations period for right of action or other remedy relating to cost disallowance);

section 106(j) (use of Compact funds for matching or cost participation requirements)

section 106(k) (allowability of cost expenditures);

section 106(m) (program income);

section 106(n) (unanticipated Secretarial savings);

section 110 (judicial and administrative remedies);

section 111 (tribal sovereign immunity and United States trust responsibility); and

the following subparagraphs of section 108(c):

1(b)(5) (limitation of costs);

1(b)(6)(B)(iii) (payment of interest under the Prompt Payment Act);

1(b)(7)(A) (exemption of tribal records from the Freedom of Information Act);

1(b)(8)(A) (transfer of divisible property);

1(b)(8)(C) (joint use agreement regarding nondivisible property);

1(b)(8)(D) (Tribal authority to acquire excess property);

1(b)(8)(E) (Secretarial assistance in obtaining confiscated or excess property);

1(b)(8)(F) (issuance of screener identification card);

1(b)(9) (availability of funds);

1(b)(10) (Tribal authority to obtain interagency motor pool vehicles and related services);

1(b)(11) (exemption from program guidelines, manuals, and policy directives);

1(d) (obligations of the United States); and

1(e)(2) (Compact and annual funding agreement modifications).

UNITED STATES OF AMERICA
DEPARTMENT OF HEALTH AND HUMAN SERVICES

By: /s/ Michael [illegible]
DIRECTOR, INDIAN HEALTH SERVICE
DATE: 5/16/96

SHOSHONE-PAIUTE TRIBES OF THE
DUCK VALLEY RESERVATION

BY: LINDSEY MANNING
Lindsey Manning, Chairman
Date: 3/6/96

Annual Funding Agreement
between the
DUCK VALLEY SHOSHONE-PAIUTE TRIBES
and the
Secretary of the Department of Health and Human Services
of the
UNITED STATES OF AMERICA

October 1, 1995

This Annual Funding Agreement is entered into by and between the Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America.

Section 1—Obligations of the IHS.

This Annual Funding Agreement ("Agreement" or "AFA") obligates the Indian Health Service (IHS) to provide funding and services identified herein in Fiscal Year 1996 and as provided is the Shoshone-Paiute Tribal Health Compact ("Compact") between the Duck Valley Shoshone Paiute Tribes and the United States as amended.

Without intending any limitation, the Phoenix Area Office will also continue to provide, but will not be limited to providing, without charge to the Tribes and upon request, technical assistance to the extent doing so does not diminish services to other tribes. The Phoenix Area Office also will continue to provide services, which will include, but not be limited to:

A. Purchasing activities under GSA contracts.
B. Administration & Management of IPAs/MOAs.
C. Region IX Legal Consultation.
D. Access to the Phoenix Indian Medical Center and related facilities, specialty or other clinics, and programs.
E. Others to be added.

Further, the Phoenix Area Office shall also provide the following services not funded under this Annual Funding Agreement:

1. Training and related travel.

The parties acknowledge that the majority of training and related travel for the positions covered by this AFA is funded on a non-recurring basis by the Area Office. The parties agree that the Tribes shall remain eligible on an equal basis with other programs operated by the Indian Health Service for such additional non-recurring training and related travel. The Indian Health Service (including each phoenix Area program director) shall on no less than a quarterly basis inform the Tribes of training opportunities available for positions covered by this AFA. Tribal training requests shall be routed through the Area program directors or the Area Director, as appropriate.

2. Quarters.

The Tribes shall receive all quarters rents from quarters occupants (including direct payments from IPAs and MOAs), and shall provide the Phoenix Area with an annual report of all quarters collections. Reimbursements received by the Owyhee Service Unit in the form of rents on government quarters for persons carrying out this AFA shall be retained at the service unit for purposes of maintenance and improvement of the quarters. Such retention shall not affect the eligibility of the quarters for maintenance and improvement funding, nor shall it affect the eligibility of the quarters to participate in the Area quarters pool, provided that the Tribes have not previously received their shares of the Area maintenance and improvement funds or Area quarters pool funds.

The parties agree that the maintenance and improvement and similar projects (with estimated completion dates) listed on the attached five-page list comprising Appendix B (together with the Owyhee Hospital diesel fuel cleanup

project and parking lot restoration project) shall be completed by the Phoenix Area Office, without charge to the Owyhee Service Unit, and that every effort shall be made by the Area to complete such projects prior to October 1, 1995.

3. Vehicles.

The Tribes shall have access to the GSA motor vehicle pool on the same basis as did the Service Unit prior to the effective date of this Agreement, subject either to the Indian Health Service agreement with the General Services Administration (GSA) or a separate tribal agreement with the GSA.

4. Federal Sources of Services and Supply.

The Phoenix Area Office shall issue a letter to the Tribes confirming the Tribes' eligibility to access federal sources of services and supply as an executive agency of the United States, and the Indian Health Service shall assist the Tribes in accessing such sources, including air carriers.

5. Printing and duplicating.

The Tribes shall, without charge to the Tribes, retain access to GSA printing services, and shall retain access to the IHS clinical support center for printing and duplicating services on the same basis as would apply if the programs listed in section 3 were being operated by the Indian Health Service.

6. Library.

The Phoenix Area Office shall consider the Tribes' requests for library maintenance needs (e.g. journals, publications and the like) on the same basis as similar requests from IHS-operated programs. The Indian Health Service will provide at no charge to the Tribes instruction and related technical training and support to the Tribes for on-line medical support computer services, under the guidance of the Phoenix Area Health Advisor.

7. Space.

The Indian Health Service shall, without cost to the Tribes, remodel the basement space in the Owyhee Community Hospital for use by persons carrying out Paragraph 3-A of this Agreement and the Compact. The remodeling project shall proceed as specified in Appendix D to this Agreement.

8. Phones.

The Tribes shall, without charge to the Tribes, retain access to FTS-2000 lines to carry out the Compact.

9. [RESERVED]

10. Property.

A. Title to all property presently used in connection with the portion of the Owyhee Service Unit covered by this Agreement, other than realty, shall be transferred to the Tribes utilizing the Title I Process. A list shall be prepared by the Indian Health Service inventorying all such property and the list shall be reconciled by the parties on or before October 1, 1995.

B. A use agreement shall be negotiated and executed by the parties on or before October 1, 1995 to cover use by the Tribes of all federal realty associated with the programs covered by Section 3 of this Agreement.

C. The Tribes shall be eligible for replacement of equipment used in connection with the Compact and this Agreement on the same basis as the Indian Health Service, as if the Indian Health Service were operating the compacted programs. This paragraph shall not apply to the extent the Tribes' Headquarters share includes equipment replacement funds.

Section 2— Obligations of the Tribes.

The Agreement obligates the Tribes to be responsible for the health programs, activities, functions, and services identified in Section 3, utilizing the resources transferred under this Agreement. This Agreement further authorizes the Tribes to consolidate and redesign programs, activities, functions, and services as provided in the Indian Self-Determination and Education Assistance Act, as amended, and the Compact.

Section 3— Tribal Programs and Budget.

The Tribes agree to be responsible for the health programs, functions, activities, and services identified below in accordance with the Compact and this Agreement, subject to the Tribes' right to redesign such programs as provided in the Act. For the purposes of this Agreement, the Tribes General Budget categories consolidate related health programs, activities, functions and services as listed below. Services are provided on the Duck Valley Reservation of Nevada and Idaho. Programs, activities, functions and services will be maintained and operated in accordance with the applicable standards of the Joint Commission on Accreditation of Health Organizations.

The applicability of the Federal Tort Claims Act shall be pursuant to Article V, Section 3 of the Shoshone-Paiute Tribal Health Compact, to section 102(d) of the Act, as amended, and to section 314 of Pub. L. No. 101-512, as amended.

A. Community Oriented Primary Care Program

The Community Oriented Primary Care Program will promote the wellness of tribal members through direct services, coordination of outside services, health promotion and disease prevention, and community education and

training. Essential elements of the Community Oriented Primary Care Program are:

1. Inpatient Hospital Services

Inpatient hospital services will be provided in the 15 bed Owyhee Community Hospital facility. Comprehensive general medical services will include doctor care, room and board, general nursing care, diagnostic tests, drugs and medical supplies.

2. Outpatient Clinical Services

The outpatient clinic will provide a comprehensive range of services including diagnosis and treatment of illness or injury; preventive care, including well baby care; periodic check-ups and routine immunizations; laboratory tests and radiological examinations. The outpatient clinic will be in operation daily Monday through Friday (holidays excluded). Primary care shall be provided by physicians and physician extenders following acceptable written protocols. They shall be supported in their efforts by registered nurses.

3. Emergency Medical Services

Emergency medical services will be provided 24 hours a day at the Owyhee Community Hospital facility. Ambulance services shall be provided 24 hours a day. Ambulance services shall be staffed by level 1 and level 2 qualified Emergency Medical Technician personnel.

4. Pharmacy Services

Prescription drugs prescribed by a Tribal Health Program doctor or referral doctor or any licensed dentist will be provided by the pharmacy at the Owyhee Community Hospital. Pharmaceuticals will be provided by a licensed registered pharmacist in accordance with State and Federal laws.

5. Medical Records

A system will be in operation which provides for the collection, processing, maintenance, prompt retrieval, and distribution of patient records according to established policies and procedures. The confidentiality, security, and safety of patient records will be ensured.

6. Medical Laboratory

Medical laboratory services will be provided under the supervision of a qualified laboratory technologist with consultation from a local pathologist. Medical laboratory services will be available 24 hours a day.

7. Radiology Services

Radiology services will be provided under the supervision of the clinical director with consultation from a board certified radiologist. Appropriate diagnostic radiology services will be immediately available 24 hours a day.

8. Dental Services

A comprehensive range of dental services will be provided at the dental clinic in the Owyhee Community Hospital. Services will include diagnostic services and preventive care; restorative services; oral surgery; periodontics; endodontics; and prosthetic devices.

9. Mental Health and Social Services

Mental Health and Social Services will include a full range of psychological and social services for both inpatients and outpatients, including counseling, psycho diagnosis, and the application of psychological principles, theories, methods and techniques. Psychological tests will be administered and interpreted. Medical problems will be referred to appropriate medical staff. Social services shall be provided in hospital, community and individual settings.

10. Public Health Nursing

Public Health Nursing Services will provide a variety of clinical and field nursing services to patients/clients and their families including screening, evaluation, counseling, discharge planning, consultation, referral to community resources and assisting clients in the optimum utilization of needed Federal, State, local and private community resources.

11. Health Education

The Health Education component will provide health promotion and disease prevention education and teach physical and mental health concepts, effective living skills and wellness in the family. Assessment of community health care needs and evaluation of community resources will be performed in collaboration with other program components.

12. Community Health Representative Services

Community Health Representative Services will include health education presentations in community and individual home settings; client assistance in a variety of clinical settings such as maternal and child health, elderly, and diabetic clinics; client transportation; home health services and general promotion of wellness within the community.

13. Alcohol and Substance Abuse Services

Alcohol and Substance Abuse Services will promote the efficient practice and coordination of substance abuse services within the Community Oriented Primary Care Program. A comprehensive range of services will be provided to clients and families including screening, evaluation, group and individual counseling, referral to community resources and assisting clients in utilizing other resources.

B. Managed Care Program (Contract Health Services)

The Shoshone-Paiute Tribes will administer a Managed Care Program in order to provide comprehensive health

services for members and descendants of members of the Tribes and other Indians determined by the Tribes to meet Federal eligibility criteria for the program. The Managed Care Program will initially adopt the Indian Health Service CHS Standard Operating Procedures, including the Dental Program Schedule of Services. The Tribes retain the right to adapt and modify the IHS procedures to meet their own circumstances and priorities, to the extent that such modifications do not impinge upon the quality of health service delivered under the program. The Managed Care Program will develop and implement its own Standard Operating Procedures. The Shoshone-Paiute Tribes will provide services consistent with those authorized in the IHS CHS Standard Operating Procedure. The delivery of these services will be limited only by the availability of financial resources. The Tribes also retain the right to modify the Indian Health Service Medical Priorities Guidelines to best address the health priorities and needs of the Indian people served by the Managed Care Program.

C. Program Management and Administration

Overall policy and responsibilities shall reside with the Shoshone-Paiute Tribes and its designated Tribal Health Organization. The Tribal Health Program Director will serve as the focal point for coordination of all health services programs, functions, activities, and services. The Director shall be guided by the policies set down by the Tribe and its designated Tribal Health Organization. The Director shall be responsible for the daily operation of all programs and facilities. Authority for health care services and operational decisions shall generally be delegated to department heads. Authority for administrative decisions and operations shall be delegated as deemed necessary for effective and efficient operation of the organization. The Director shall be assisted

and supported by appropriate administrative specialists including hospital administrator, budget officer, patient business office manager, and information systems manager. The Tribe and/or its designated Tribal Health Organization shall provide general administrative support services including financial accounting and bookkeeping, payroll, insurance and risk management, internal control and audit, property and supply management, and human resource services.

D. Other Programs and Services Funded:

1. Any new health care program funded during FY 1996 including but not limited to programs identified in the Indian Health Care Improvement Act, as amended.

2. Any new health care program resulting from the reallocation of funds and redesign of programs during FY 1996 in accordance with the terms of the Compact.

3. Any new programs or services established by Federal or State legislation which the Shoshone-Paiute Tribes determine they accept. This would include any products of health care reform.

Section 4- Amounts Available in Fiscal Year 1996

(a) The following amounts are available to the Tribes pursuant to the Compact and Title III of the Indian Self-Determination and Education Assistance Act, as amended, and are subject to reductions only in accordance with Section 106 of that Act during the term of this Annual Funding Agreement (TBD means "To Be Determined"):

	Annual Funding
Recurring base: Inclusive of all recurring funding, including recurring contract support funds.[1]	$6,319,537
Non-recurring funding: Inclusive of non-recurring contract support funds and such other funding which maybe added to the contract. [2]	$212,791

[1] The specified amount includes $697,888, covering all programs specified in the Tribes' Annual Funding Agreement for FY 1995, as amended through Amendment No. 1, including recurring contract support cost funds and annual program increases for FY 1995, and as readjusted to cover a full 12 month fiscal year cycle. The specified amount also includes the sum of $2,848,555 for operation of the Owyhee Hospital and all related programs (based on FY 1995 figures), the sum of $1,200,000 for operation of the Managed Care Program (based on FY 1995 figures), and the sum of $1,573,094 in requested recurring direct and indirect contract support cost funds associated with both those programs.

The Tribes hereby request, and the Indian Health Service agrees, that the Headquarters Office of Tribal Activities (OTA) shall negotiate directly with the Tribes the Tribes' request for recurring and nonrecurring contract support cost funding, and that OTA shall promptly notify the Tribes of OTA's funding decisions, specific reasons for declining any requested amount, and the Tribes' appeal rights.

The amount set forth will be adjusted on or before January 1, 1996 to reflect annual program increases, as required by section 106(a)(1) of the Act, and such increased amounts shall be paid in a lump sum on that date.

[2] Of the specified amount, $212,791 has been requested as one-time start-up or preaward contract support funds and associated indirect costs in connection with the Managed Care Program described in section 3-B of this Agreement, and the hospital-operated portion of the Comprehensive Programs described in section 3-A of this Agreement. Other non-recurring funds will not be specifically identified in this Agreement, but will be provided to the Tribes in the future to the same extent as they would have been provided to the Owyhee Service Unit in the absence of this Compact. Without intending any limitation, these amounts shall include sums relating to such programs or initiatives as HP/DP, special pay, permanent change of station, IDS, and the clinical support center.

OTHER	TBD
Subtotal:	$6,532,328
Area "tribal" share to include funding identified from Area Office and identified in Appendix A to this Agreement.[3]	$213,609

The parties agree that the amount specified in the table shall be increased to add all remaining surplus funds (e.g. CHS and X account funds) allocated in FY 1995 or earlier to the portion of the Owyhee Service Unit that is subject to this Agreement, and which funds have been obligated but not expended by the Owyhee Service Unit prior to the effective date of this Agreement (and which have not previously been added to the Tribes' FY 1995 AFA, as amended (pursuant to footnote 2 of that AFA Amendment No. 1)).

[3] The Area tribal share was determined using a 30/70 (number of tribes/number of active users) formula for all Area programs not allocated to the service unit level and not reserved as part of the Area residual amount. The parties agree to adjust the calculation of Area tribal shares based upon the final FY 1996 congressional appropriation amounts, such adjustment to be finalized and paid no later than January 1, 1996.

Phoenix Area tribal shares for all Area tribal compactors are as set forth in the *Phoenix Area Office Self-Governance Summary-1995 Negotiations* (6/13/95 printout*) and the Source of AFA Area Office Resources (Estimated)*, FY 1996 *Duck Valley Tribal Negotiations, Phoenix Area Indian Health Service* (6/13/95 printout), subject to further amendment as set forth here and in section 9(c) of this Agreement. The parties agree that the formulae applied to calculate the Tribes' share of funds shall be applied equally to all Phoenix Area compactors. In the event such formulae are not so applied, this Agreement shall be subject to renegotiation.

The Tribes' Area tribal share for FY 1996 does not include recurring alcohol program dollars included in the tribal share due under the Tribes' FY 1995 Agreement, as amended. Instead, such sums are included in the Tribes' base amount for FY 1996.

As anticipated in footnote 3 of the original FY 1995 Agreement, as amended, and in the text of Amendment No 1 of that Agreement, the sum set forth herein reflects a revised active user count for the Tribes of 1,418. *See also* note 4.

The amount set forth herein includes the Tribes' share of Area M&I Large Project Pool Funds. The Tribes reserve the right during the term of

Headquarters-Tribal share: "tribal share adjustment" formula including all funds identified in Appendix A.[4]	$70,039
Headquarters-Tribal share: "program formula pool"-to include all funds identified in Appendix A, and such additional funds which the IHS may make available on a program formula basis during the year based on the programs accepted for this allocation in Appendix A.[5]	$10,423
ISDM support on the "tribal shares" identified above including funding from both Headquarters and Area Office as identified in Appendix A.[6]	TBD
Subtotal-Tribal Shares	$294,071
TOTAL COMPACT FUNDING	$6,826,399

this Agreement to delete this program from this Agreement and to return this sum to the Area. The Tribes agree to inform the Area Office of their election to return said sums to the Area within 30 days after receipt from the Area of the results of the upcoming 'deep look' survey of the Owyhee Hospital and the quarters, including the cost estimates associated with remedying whatever deficiencies are identified in that survey.

The Tribes Area Tribal Share and Headquarters Tribal Share do not include $68,999 and $1,920, respectively, in Sanitation Facilities Construction funds. As reflected in Appendix A hereto, these amounts represent a 'buy-back' of such services from the Indian Health Service. Owyhee Service Unit projects covered by the SFC program are as specified in Appendix C.

[4] As noted in footnote 3, the sum set forth herein reflects a revised active user-count for the Tribes of 1,418. The FY 1995 Agreement obligated the parties to continue to reconcile user population estimates. The reconciliation revealed that eligible active users were not counted due to their residence outside the service unit. The Service has agreed to include the additional 203 omitted users as noted in footnotes 2 and 3 of the 1995 AFA, as amended, and in the Text of Amendment No. 1. For Headquarters share calculations, an adjustment proportional to the count for the additional users shall be added to the FY 1996 AFA amount, based on the formula "[TSAS/1215] * 1418," with "TSA" meaning the Tribes' "tribal size adjustment" formula amount. (Originally the Headquarters tribal shares were allocated according to the formulae developed by Headquarters and left unchanged by the Phoenix Area Office.)

[5] Additional amounts to be included shall include, but not be limited to,

These amounts are subject to additions for Medicare, Medicaid, other reimbursements, and for new funds received during the term of this Agreement including amounts that have historically been distributed as non-recurring funds under Title I of the Indian Self-Determination and Education Assistance Act, as amended.

(b) Indirect costs shall be negotiated for this Annual Funding Agreement in compliance with section 106(d)(1) and 106(e) of the Indian Self-Determination and Education Assistance Act, as amended.

(c) An additional lump sum of funds in an amount to be negotiated pursuant to Article V, Section 12 of the Shoshone-Paiute Tribal Health Compact and in accordance with procedures in ISDM 92-2 shall be provided to the Tribes to defray start-up costs. The Tribes have included their requested start-up costs in the footnotes to the matrix set forth above. The final negotiation for start-up costs will be completed by October 1, 1995. The date of submission of the Tribes' request shall be considered to be the date the Tribes' initial request was received by the Phoenix Area Office. Neither the amount of start-up costs to be paid, nor the place in the ISD fund queue, shall be affected by any amendment of ISDM 92-2 that may occur.

(d) The amount available from Area for tribal shares reflects the transition plan agreed upon by the parties and does not reflect the full amount that will be available in future years.

any Fiscal Intermediary funds that may become available as a result of the IHS Director's upcoming decisions regarding distribution of this fund.

[6] The amount of contract support cost funding to support Area and Headquarters tribal share activities will be determined at a later date, and this Agreement shall be correspondingly modified to reflect such determination.

(e) The funds provided under this Agreement have been negotiated using certain residual and categorical line item assumptions. The parties have agreed to review the determination of IHS Headquarters residual resources and agree that the funds provided based upon residual may change in FY 1997.

(f) The parties agree that the Tribes have a right to receive a percentage of the Management Initiative Fund of the Headquarters' budget based on the Tribal Size Adjustment Formula. The percentage of the fund to be made available for tribal distribution in FY 1996 shall be determined in mutual negotiation with the Tribes. The negotiations shall be concluded prior to August 30, 1995, and the Tribes' Tribal Size Adjustment share of the amount to be distributed shall be included in the Tribes' share of Headquarters funds under the Tribes' FY 96 Annual Funding Agreement, through addition to this Agreement. Any balance in the fund as of September 1, 1996 shall be paid to the Tribes under this Agreement on the basis of the Tribal Size Adjustment Formula.

(g) Once determined, the proportional share of the Tribes' mandatories, deferred services and any other funding for which the Tribes are eligible will be provided as an amendment to this Annual Funding Agreement.

Section 5—Method of Payment.

(a) Payment Schedule. Except as provided in subsections b, c, and d of this section, all funds identified in Section 4 of this Agreement shall be paid to the Tribes, in accordance with Article II, Section 4.a. of the Compact, payment to the Tribes to be made as follows:

> One annual payment in lump sum to be made annually in advance (on October 1, 1995) by check or wire transfer, subject to the apportionment process.

(b) Availability of Tribal Shares. The Indian Health Service shall provide 100 percent the negotiated amount of tribal shares from Headquarters, and 100 percent of tribal shares negotiated from the Phoenix Area Office. No less than 70% of the amount due from Headquarters tribal shares will be paid to the Tribes in their initial lump sum payment, with the remaining amount (if any) to be paid to the Tribes no later than July I, 1996.

(c) IPAs/MOAs. The Tribes have determined that they wish to carry out certain of their responsibilities to provide programs, activities, functions or services, (i.e. salaries of IPA/MOA employees) included in this Annual Funding Agreement utilizing services, personnel, supplies or other resources of the Federal Government, as permitted by law. Due to unique circumstances involving the historic funding pattern of the Owyhee Service Unit, including its historic financial deficit despite persistent vacancies in the Service Unit, the parties have developed a separate Memorandum of Agreement to address how to manage funds covering tribal utilization of federal personnel, services, supplies and the like.

(d) Periodic Payments: Payment of funds otherwise due the Tribes under this Agreement, which are added or identified after the initial payment is made, shall be made promptly upon request of the Tribes by check or wire transfer.

(e) Interest on late payments. Interest shall be paid on late payments as specified in the Prompt Payment Act to the extent not contrary to law.

Section 6—[Reserved]

Section 7—Contract Support Funding.

The Tribes shall be entitled to contract support funding on the same basis as tribes and tribal organizations who contract under Title I of the Act. In determining the amount of

contract support funds to be provided under the Compact, the following procedures shall apply.

(a) Existing Contract Base. The Tribes' program base established in this Agreement will be included in the base in successor AFAs (absent the addition of new programs to this Agreement as provided in subparagraph (b) hereof), and the Tribes will be entitled to share appropriate mandatory and other inflation increases in common with all other tribes. Indirect contract support funds, based on the application of the Tribes' negotiated indirect cost rate, shall be added to the Tribes' program base for FY 1996 and may be increased in subsequent years if required by the Tribes' negotiated indirect cost rate.

(b) New program funds other than Area and Headquarters tribal shares. To the extent not inconsistent with sections 106(a) and (b) of the Indian Self-Determination Act, and unless superseded, the provisions of the Indian Health Service's ISDM 92-2 shall be applied to additional program funding for activities assumed by the Tribes as an expansion of the existing operations described in subparagraph (a) above. Recurring direct and indirect contract support shall be added to the Tribes' funding base for FY 1996 and subsequent years. This paragraph shall apply to the programs specified in Paragraphs 3-B and 3-C of this Agreement.

In determine the Tribes' entitlement to contact support costs, the Tribes shall negotiate directly with the Office of Tribal Activities (OTA) and no decision by that office shall be made until such negotiations have occurred. The Office of Tribal Activities shall notify the Tribes in detail and in writing of its determinations, together with detailed reasons explaining any disapproval of the Tribes' request and the Tribes' appeal rights from such determinations.

(c) Area and Headquarters funds. The Tribes will be entitled to contract support funds to the full extent specified in section 106(a)(2) of the Act and related provisions.

Section 8—Sufficiency of Service Unit Funding. The Phoenix Area Office has expressed the view that the base service unit funding included herein for operation of the Owyhee Hospital is sufficient to operate the hospital within budget at full staffing of professional and managerial staff. The Tribes have expressed skepticism based upon their own professional assessments.

The Tribes have requested that if, as a result of full recruitment at the Owyhee Hospital in FY 1996, or as a result of unforeseen circumstances, the Tribes experience a shortfall, the Indian Health Service should agree to fund such shortfall, provided that the Tribes have first furnished the Service with a full accounting of the circumstances giving rise to the shortfall and have satisfied the Service that the Tribes have managed their available funds prudently. The Indian Health Service has declined to make this agreement in advance, but has agreed to reserve the authority to address such a contingency on an emergency basis as the circumstances warrant.

For the record, the Phoenix Area Office takes the position that the appropriation process nationally funds only approximately 60% to 70% of need. Further, the Phoenix Area Office notes that over the past two years it has increased the recurring base funding to the Owyhee Service Unit. It is the position of the Phoenix Area Office that the Owyhee Service Unit does not experience funding shortfalls different in kind from that experienced by other service units.

Section 9—Adjustments.

(a) Due to Congressional Actions. The parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to adjustment due to Congressional

action in appropriations Acts or other laws affecting availability of funds to the Indian Health Service and the Department of Health and Human Services. Upon enactment of any such Act or law, the amount of funding provided to the Tribes in this Agreement shall be adjusted as necessary, after the Tribes have been notified of such pending action and subject to any rights which the Tribes may have under this Agreement, the Compact, or the law.

(b) Financial Adjustments to Annual Funding Agreement during Review Period. It is recognized that since self-governance is a demonstration project, there may be errors in calculations, or mistakes in defining the tribal population, number of tribes, recurring base, or definitions of other variables which determine tribal shares which may need to be renegotiated during the review period under Section 303(a)(9) of the Indian Self-Determination and Education Assistance Act, as amended. Both parties agree to take prompt action to correct such errors as they are identified.

(c) Recalculation of Area Tribal Shares Based Upon Residual Amounts. The parties note that the Area tribal share calculation set forth herein has been based upon an interim and renegotiable Area residual level of 46 FTEs. The parties agree that during the first six months of FY 1996 the parties will undertake and complete (with the active participation of other interested Phoenix Area Tribes) a study of the Area residual function, with the study limited to those inherently federal functions that can only be performed by federal officials of the Indian Health Service (hereafter the "Phoenix Area FY 1996 Residual Study").

The parties agree that the amount of the Tribes' Area tribal share for FY 1996 shall, at the Tribes' request, be subject to renegotiation at the residual levels determined in the Phoenix Area FY 1996 Residual Study. In the event of such renegotiation, any additional tribal shares payable to the Tribes shall

be paid on or before May 1, 1996, and no interest shall be due on such additional sum for any period preceding that date.

Section 10—Program Rules.

The Tribes will make every effort to carry out the health programs, activities, functions, and services in this Agreement in compliance only with:

JCAHO Standards for Hospitals and Ambulatory Care Facilities, as applicable.

Section 10A—Property.

The Tribes shall retain title to all property purchased with funds provided under this Annual Funding Agreement. The Indian Health Service shall transfer to the Tribes title to all property (other than realty) used in connection with the programs identified in section 3 of this Agreement, and within 30 days from the date of execution of this Amendment No. 1 the Indian Health Service shall provide the Tribes with a complete and inventoried listing of all such transferred property. All property referred to in this paragraph shall hereafter be replaced by the Indian Health Service on the same basis as if title to such property were in the Indian Health Service.

Section 11—[Reserved]

Section 12—Headquarters and Area Responsibilities.

Unless funds are specifically provided from Headquarters or Area, Headquarters and Area retain all programs, activities, functions, and services and the Tribes, their members, and their service unit population will not be denied access to, or services from, Headquarters or Area.

Section 13—Access to Training and Technical Assistance.

To the extent funds are retained by the Indian Health Service, the Tribes shall have access to training, continuing education, and technical assistance in the same manner as if

the Tribes' programs had remained under federal administration and to the same extent the Tribes would have received such services if they were not participating in the Self-Governance Demonstration Project.

Section 14—Amendment or Modification of this Agreement.

(a) Form of Amendments. Except as otherwise provided by this Agreement, the Compact, or by law, any modifications to this Agreement shall be in the form of a written amendment and shall require written consent of the Tribes and the United States.

(b) Services from IHS. Should the Tribes determine that they wish the Indian Health Service to provide programs, activities, functions or services included in this Annual Funding Agreement for which funding has been identified but not provided, the parties shall negotiate an amendment to the Annual Funding Agreement to reflect the transfer of responsibilities from the Tribes back to the Indian Health Service and the pro-rata share of funding for that program, activity, function or service shall be retained by the Indian Health Service.

(c) Due to Addition of New Program. Should the Tribes determine that they wish to provide a program, activity, function or service of the Indian Health Service not included in this Annual Funding Agreement, the Tribes shall submit a proposal to the Indian Health Service to provide such program, activity, function, or service. Such proposals shall be reviewed by the Indian Health Service in accordance with the contract proposal review process and timelines set forth in Section 102 of the Indian Self-Determination and Education Assistance Act, and the funding provisions of sections 106(a)(1) and 106(a)(2) of Title I and of Title III, as amended. Proposals submitted pursuant to this section shall be treated as a request for amendment to the Annual Funding

Agreement and, once approved by the Indian Health Service, shall be added to the Agreement by amendment.

(d) Due to Availability of Additional Funding. The Tribes shall be eligible for any increases in funding or funding for new programs to which they would have been eligible had they been administering programs under a self-determination contract, rather than under the Shoshone-Paiute Tribal Health Compact and this Agreement, and for any other funds that are not restricted by appropriations language for which any tribe or tribal organizations may be eligible, including any new funds appropriated for Indian, Health Service Headquarters and funds passed to the Phoenix Area as recurring or non-recurring funds, and this Agreement shall be amended to provide for timely payment of such new funds to the Tribes.

Section 15—Severability.

(a) Except as provided in this section, this Agreement shall not be considered invalid, void or voidable if any section or provision of this Agreement is found to be invalid, unlawful or unenforceable by a court of competent jurisdiction.

(b) If any section or provision of this Agreement is found to be invalid, unlawful or unenforceable by a court of competent jurisdiction, either party may, at its option, treat this Agreement as invalid, void, voidable, in accordance with the provisions of the Compact.

(c) In the event that the parties decide to treat the Agreement as invalid, void or voidable, under subsection (b) of this section, the parties will seek agreement to amend, revise, or delete any such invalid, unlawful or unenforceable sections or provision, in accordance with the provisions of the Compact.

Section 16—Effective Date and Duration.

This Annual Funding Agreement shall become effective on January 1, 1995, and remain in effect through the remainder

of the 1995 federal Fiscal Year or until a successor agreement is negotiated and becomes effective pursuant to Article II, Section 12 of the Compact.

United States of America
Secretary of the Department of
Health and Human Services

/s/ [illegible]
Director, Indian Health Service

Date: JUNE 30, 1995

Duck Valley Shoshone-Paiute Tribes

/s/ Renee Rose
RENEE ROSE, Vice Chairperson for
By: Lindsey Manning, Tribal Chairman

Date:6/28/95

IHS FOOTNOTE 06/30/95—This agreement is contingent upon an internal review, during the 90 day review period, for consistency with Federal law and accuracy of calculations. Issues identified will be shared with the tribe(s) for further negotiations. Therefore, these issues should be considered unresolved, e.g., funding of HQ tribal shares, title I provisions, contract support costs, and MOA/IPA agreements, etc. The Director in agreeing to sign the AFA will identify the issues and continue to negotiate with the tribe for resolution within the 90 day review period.

[See JA Vol. II, PART 1 for attached
Appendix A (funding tables)]

Amendment No. 1

Annual Funding Agreement

between the

DUCK VALLEY SHOSHONE-PAIUTE TRIBES

and the Secretary of the Department of Health
and Human Services of the

UNITED STATES OF AMERICA

October 1, 1995, as amended March 6, 1996

This Amendment No. 1 amends and supersedes any inconsistent provision of the original Annual Funding Agreement between the parties dated October 1, 1995, (hereafter "AFA") and in part sets forth updated funding figures for Fiscal Year 1996.

The parties hereby agree as follows.

1. In AFA footnote no. 1 the phrase "the sum of $1,573,094 in requested recurring direct and indirect contract support funds" is hereby stricken and replaced with the following:

> the sum of $1,667,566 in approved and agreed recurring direct ($494,517) and non-recurring indirect ($1,173,149) contract support funds (subject to further adjustment up or down according to the Tribes' indirect cost rate) associated with both those programs. As provided in the Compact, the amounts approved for direct and indirect contract support shall be paid subject only to the availability of appropriations.

2. In AFA footnote no. 2 the first sentence is stricken and replaced with the following:

> Of the specified amount, $367,400 has been approved and agreed as non-recurring direct start-up or preaward contract support costs in connection with the programs described in section 3-A (hospital operated portion) and 3-B of this Agreement. As provided in the Compact, this amount shall be paid subject only to the availability of appropriations.

3. The amount set forth in text at AFA footnote no. 1 shall be reduced to reflect that indirect contract support cost funding is nonrecurring to the Tribes. The total recurring funding shall read "$5,240,860."

4. The amount set forth in text at AFA footnote no. 2 shall read "$367,400" plus indirect contract support.

This Amendment No. 1 shall be subject to further adjustment as set forth in the AFA. This amendment includes a one-page document entitled IHS Form A (revised Feb 29, 1996), and supercedes Appendix A to the AFA.

This Amendment No. 1 shall be effective as of October 1, 1995 insofar as it substitutes corrected figures for those figures set forth in the AFA.

United States of America
Secretary of the Department of
Health and Human Services

By:_____
Director, Indian Health Service
Date: _____
Duck Valley Shoshone-Paiute Tribes

/s/ James Paiva,
JAMES PAIVA, Tribal Chairman
Date: May 22 1996

Annual Funding Agreement
between the
DUCK VALLEY SHOSHONE-PAIUTE TRIBES
and the
Secretary of the Department of Health and Human Services
of the
UNITED STATES OF AMERICA
October 1, 1996

This Annual Funding Agreement is entered into by and between the Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America.

Section 1—Obligations of the IHS.

This Annual Funding Agreement ("Agreement" or "AFA") obligates the Indian Health Service (IHS) to provide funding and services identified herein in Fiscal Year 1997 and as provided in the Shoshone-Paiute Tribal Health Compact ("Compact"), as amended, between the Duck Valley Shoshone Paiute Tribes and the United States.

Without intending any limitation, the Phoenix Area Office will also continue to provide, but will not be limited to providing, without charge to the Tribes and upon request, technical assistance to the extent doing so does not diminish services to other tribes. The Phoenix Area Office also will continue to provide services, which will include, but not be limited to:

A. Purchasing activities under GSA contracts.

B. Region IX Legal Consultation.

C. Access to the Phoenix Indian Medical Center and related facilities, specialty or other clinics, and programs.

D. Others to be added.

Further, the Phoenix Area Office shall also provide the following services not funded under this Annual Funding Agreement:

1. Training and related travel.

   The parties agree that the Tribes shall remain eligible to participate in training activities offered or funded by the Indian Health Service on an equal basis with other programs operated by the Indian Health Service. The Indian Health Service (including each Phoenix Area program director) shall provide reasonable notice to the Tribes of training opportunities available for positions covered by this AFA. Tribal training requests shall be routed through the Area program directors or the Area Director, as appropriate.

2. Quarters.

   The Tribes shall receive all quarters rents from quarters occupants (including direct payments from IPAS and MOAs), and shall provide the Phoenix Area with an annual report of all quarters collections. Reimbursements received by the Owyhee Service Unit in the form of rents on government quarters for persons carrying out this AFA shall be retained at the service unit for purposes of maintenance and improvement of the quarters. Such retention shall not affect the eligibility of the quarters for maintenance and improvement funding, nor shall it affect the eligibility of the quarters to participate in the Area quarters pool, provided that the Tribes have not previously received their shares of the Area maintenance and improvement funds or Area quarters pool funds. The parties agree to cooperate in securing payments of arrearages from federal IPA/MOA

employees occupying the Owyhee quarters, subject to such terms as the parties may negotiate.

The parties agree that the maintenance and improvement and similar projects (with estimated completion dates) listed on Appendix B to the parties' FY 1996 AFA (together with the Owyhee Hospital diesel fuel cleanup project and parking lot restoration project) shall be completed by the Phoenix Area Office, without charge to the Owyhee Service Unit, and that every effort shall be made by the Area to complete such projects prior to October 31, 1996.

3. Vehicles.

   The Tribes shall have access to the GSA motor vehicle pool on the same basis as did the Service Unit prior to tribal operation of the Service Unit subject either to the Indian Health Service agreement with the General Services Administration (GSA) or a separate tribal agreement with the GSA.

4. Federal Sources of Services and Supply.

   The Indian Health Service shall assist the Tribes in accessing federal sources of supply, including air carriers.

7. Space.

   In the 1996 AFA the parties agreed as follows:

   The Indian Health Service shall, without cost to the Tribes, remodel the basement space in the Owyhee Community Hospital for use by persons carrying out Paragraph 3-A of this Agreement and the Compact. The remodeling project shall proceed as specified in Appendix D to this Agreement. In 1997 the parties are exploring the availability of additional contract support costs to fund this effort.

8. Phones.

The Tribes shall, without charge to the Tribes, retain access to FTS- 2000 lines to carry out the Compact.

10. Property.

A use agreement shall be negotiated and executed by the parties on or before October 31,1996 to cover use by the Tribes of all federal realty associated with the programs covered by Section 3 of this Agreement.

Section 2—Obligations of the Tribes.

The Agreement obligates the Tribes to be responsible for the health programs, activities, functions, and services identified in Section 3, utilizing the resources transferred under this Agreement. This Agreement further authorizes the Tribes to consolidate and redesign programs, activities, functions, and services as provided in the Indian Self-Determination and Education Assistance Act, as amended, and the Compact.

Section 3—Tribal Programs and Budget.

The Tribes agree to be responsible for the health programs, functions, activities, and services identified below in accordance with the Compact and this Agreement, subject to the Tribes' right to redesign such programs as provided in the Act. For the purposes of this Agreement, the Tribes General Budget categories consolidate related health programs, activities, functions and services as listed below. Services are provided on the Duck Valley Reservation of Nevada and Idaho. Programs, activities, functions and services will be operated in accordance with applicable federal laws governing eligibility for direct care services and contract health care services.

The applicability of the Federal Tort Claims Act shall be pursuant to Article V, Section 3 of the Shoshone-Paiute Tribal Health Compact, to section 102(d) of the Act, as amended, and to section 314 of Pub. L. No. 101-512, as amended.

A. Community Oriented Primary Care Program

The Community Oriented Primary Care Program will promote the wellness of tribal members through direct services, coordination of outside services, health promotion and disease prevention, and community education and training. Essential elements of the Community Oriented Primary Care Program are:

1. Inpatient Hospital Services

Inpatient hospital services will be provided in the 15 bed Owyhee Community Hospital facility. Comprehensive general medical services will include doctor care, room and board, general nursing care, diagnostic tests, drugs and medical supplies.

2. Outpatient Clinical Services

The outpatient clinic will provide a comprehensive range of services including diagnosis and treatment of illness or injury; preventive care, including well baby care; periodic check-ups and routine immunizations; laboratory tests and radiological examinations. The outpatient clinic will be in operation daily Monday through Friday (holidays excluded). Primary care shall be provided by physicians and physician extenders following acceptable written protocols. They shall be supported in their efforts by registered nurses.

3. Emergency Medical Services

Emergency medical services will be provided 24 hours a day at the Owyhee Community Hospital facility. Ambulance services shall be provided 24 hours a day. Ambulance services shall be staffed by level 1 and level 2 qualified Emergency Medical Technician personnel.

4. Pharmacy Services

Prescription drugs prescribed by a Tribal Health Program doctor or referral doctor or any licensed dentist will be provided by the pharmacy at the Owyhee Community Hospital. Pharmaceuticals will be provided by a licensed registered pharmacist in accordance with State and Federal laws.

5. Medical Records

A system will be in operation which provides for the collection, processing, maintenance, prompt retrieval, and distribution of patient records according to established policies and procedures. The confidentiality, security, and safety of patient records will be ensured.

6. Medical Laboratory

Medical laboratory services will be provided under the supervision of a qualified laboratory technologist with consultation from a local pathologist. Medical laboratory services will be available 24 hours a day.

7. Radiology Services

Radiology services will be provided under the supervision of the clinical director with consultation from a board certified radiologist. Appropriate diagnostic radiology services will be immediately available 24 hours a day.

8. Dental Services

A comprehensive range of dental services will be provided at the dental clinic in the Owyhee Community Hospital. Services will include diagnostic services and preventive care; restorative services; oral surgery; periodontics; endodontics; and prosthetic devices.

9. Mental Health and Social Services

Mental Health and Social Services will include a full range of psychological and social services for both inpatients and outpatients, including counseling, psycho-diagnosis, and the application of psychological principles, theories, methods and techniques. Psychological tests will be administered and interpreted. Medical problems will be referred to appropriate medical staff. Social services shall be provided in hospital, community and individual settings.

10. Public Health Nursing

Public Health Nursing Services will provide a variety of clinical and field nursing services to patients/clients and their families including screening, evaluation, counseling, discharge planning, consultation, referral to community resources and assisting clients in the optimum utilization of needed Federal, State, local and private community resources.

11. Health Education

The Health Education component will provide health promotion and disease prevention education and teach physical and mental health concepts, effective living skills and wellness in the family. Assessment of community health care needs and evaluation of community resources will be performed in collaboration with other program components.

12. Community Health Representative Services

Community Health Representative Services will include health education presentations in community and individual home settings; client assistance in a variety of clinical settings such as maternal and child health, elderly, and diabetic clinics; client transportation; home health services and general promotion of wellness within the community.

13. Alcohol and Substance Abuse Services

Alcohol and Substance Abuse Services will promote the efficient practice and coordination of substance abuse services within the Community Oriented Primary Care Program. A comprehensive range of services will be provided to clients and families including screening, evaluation, group and individual counseling, referral to community resources and assisting clients in utilizing other resources.

B. Managed Care Program (Contract Health Services)

The Shoshone-Paiute Tribes will administer a Managed Care Program in order to provide comprehensive health services for members and descendants of members of the Tribes and other Indians determined by the Tribes to meet Federal eligibility criteria for the program. The Managed Care Program will initially adopt the Indian Health Service CHS Standard Operating Procedures, including the Dental Program Schedule of Services. The Tribes retain the right to adapt and modify the IHS procedures to meet their own circumstances and priorities, to the extent that such modifications do not impinge upon the quality of health service delivered under the program. The Managed Care Program will develop and implement its own Standard Operating Procedures. The Shoshone-Paiute Tribes will provide services consistent with those authorized in the IHS CHS Standard Operating Procedure. The delivery of these services will be limited only by the availability of financial resources. The Tribes also retain the right to modify the Indian Health Service Medical Priorities Guidelines to best address the health priorities and needs of the Indian people served by the Managed Care Program.

C. Program Management and Administration

Overall policy and responsibilities shall reside with the Shoshone-Paiute Tribes and its designated Tribal Health Organization. The Tribal Health Program Director will serve as the focal point for coordination of all health services programs, functions, activities, and services. The Director shall be guided by the policies set down by the Tribe and its designated Tribal Health Organization. The Director shall be responsible for the daily operation of all programs and facilities. Authority for health care services and operational decisions shall generally be delegated to department heads. Authority for administrative decisions and operations shall be delegated as deemed necessary for effective and efficient operation of the organization. The Director shall be assisted and supported by appropriate administrative specialists including hospital administrator, budget officer, patient business office manager, and information systems manager. The Tribe and/or its designated Tribal Health Organization shall provide general administrative support services including financial accounting and bookkeeping, payroll, insurance and risk management, internal control and audit, property and supply management, and human resource services.

D. Other Programs and Services Funded:

1. Any new health care program funded during FY 1997 including but not limited to programs identified in the Indian Health Care Improvement Act, as amended.

2. Any new health care program resulting from the reallocation of funds and redesign of programs during FY 1997 in accordance with the terms of the Compact.

3. Any new programs or services established by Federal or State legislation which the Shoshone-Paiute Tribes determine they accept. This would include any products of health care reform.

Section 4—Amounts Available in Fiscal Year 1997

(a) The following amounts are available to the Tribes pursuant to their Compact and to Title III of the Indian Self-Determination and Education Assistance Act, as amended, and are subject to reductions only in accordance with Section 106 of that Act during the term of this Annual Funding Agreement ("TBD" means "To Be Determined"):

	Annual Funding
Recurring base: Inclusive of all recurring funding, including recurring contract support funds.[1]	$6,561,805

[1] The specified amount includes the sum of $4,714,611 for operation of the Owyhee Hospital and all related programs including community health programs (based on FY 1996 figures) funded at the Service- Unit level, and the sum of $1,847,196, in recurring direct and indirect contract support cost funds associated with those programs. Of this last sum, the Tribes take the position that the sum of $1,667,666 in recurring direct ($494,517) and indirect ($1,173,149) contract support should have also been paid to the Tribes in fiscal year 1996; while the Indian Health Service disagrees that it had any legal obligation to pay such sums in fiscal year 1996, nothing herein is intended to affect in any manner the Tribes' claim in this respect.

The amount set forth will be adjusted within three months of a final appropriation appropriating funds payable under this AFA, as required by section 106(a)(l) of the Act, and such increased amounts shall be paid in a lump sum within that time.

	Annual Funding
Nonrecurring funding: Inclusive of nonrecurring contract support funds.[2]	$435,762
OTHER:	
Subtotal:	TBD
	$6,997,567
Area "tribal" share to include funding identified from Area Office and identified in Form A to this Agreement.[3]	$93,109

[2] Of the specified amount, $367,400 represents one-time start-up or preaward contract support funds in connection with the Managed Care Program described in section 3-B of this Agreement, and the hospital-related portion of the Comprehensive Program described in section 3-A of this Agreement. The Tribes take the position that the sum of $367,400 in nonrecurring start-up contract support should have been paid to the Tribes in fiscal year 1996; while the Indian Health Service disagrees that it had any legal obligation to pay such sums in fiscal year 1996, nothing herein is intended to affect in any manner the Tribes' claim in this respect.

Other non-recurring funds will not be specifically identified in this Agreement, but will be provided to the Tribes in the future to the same extent as they would have been provided to the Owynee Service Unit in the absence of this Compact.

The sums included herein for special pay and permanent change of station ($68,362) shall be subject to adjustment in the event the Tribes are paid direct contract support cost funds for these functions in fiscal year 1997.

[3] The Area tribal share was determined using a 30/70 (number of tribes/number of active users) formula for all Area programs not allocated to the service unit level and not reserved as part of the Area residual amount. The parties agree to adjust the calculation of Area tribal shares based upon the final FY 1997 congressional appropriation amounts, such adjustment to be finalized and paid no later than January 1, 1997.

Phoenix Area tribal shares for all Area tribal compactors are as set forth in the *Phoenix Area Office Self-Governance Summary—1996 Negotiations* (5/ /96 printout) and the *Source of AFA Area Office Resources (Estimated), FY 1997 Duck Valley Tribal Negotiations, Phoenix Area Indian Health Service* (5/-/96 printout), subject to further

	Annual Funding
Headquarters—Tribal share: "tribal share adjustment" formula including all funds identified in Form A, and such additional funds which the IHS may make available on a TSA basis during the year based on the	$51,390

amendment as set forth here and in section 9(c) of this Agreement. The parties agree that the formulae applied to calculate the Tribes' share of funds shall be applied equally to all Phoenix Area compactors. In the event such formulae are not so applied, this Agreement shall be subject to renegotiation.

The amount set forth herein includes the Tribes' share of Area M&I Large Project Pool Funds. The Tribes reserve the right during the term of this Agreement to delete this program from this Agreement to the extent said funds have not yet been paid to the Tribes, and for the Indian Health Service to retain such funds.

The Tribes' Area Tribal Share and Headquarters Tribal Share specified here do not include the retained Sums referenced in section 6 of the Annual Funding Agreement.

The Tribes' share of the "fiscal intermediary" (FI) activity is based on data which the Tribes believe inaccurately reflects the Tribes' level of use of the FI at the time the Tribes took over operation of the Owyhee Community Health Facility on October 1, 1995. The parties have agreed to research the relevant data, and the sum set forth in Appendix A for FI shall be subject to adjustment if the current data is determined to be inaccurate. In the event the Tribes are dissatisfied with the results of the research, the matter shall be presented to the IHS Ratifier for final determination. The sum set forth herein shall be adjusted to reflect the results of any adjustments made by the parties or the IHS Ratifier.

The amount set forth herein shall be amended to reflect the parties' final agreement regarding the residual level in fiscal year 1997.

[4] The sums set forth herein reflect a revised active user count for the Tribes of 1,406. The Tribes' FY 1995 Annual Funding Agreement obligated the parties to continue to reconcile user population estimates. The reconciliation revealed that certain eligible active users were not counted due to their residence outside the service unit. The Service has agreed to include the additional users as noted in footnotes 2 and 3 of the 1995 AFA, as amended, and in the text of Amendment No. 1 to the 1995

programs accepted for this allocation in Form A.[4]	
Headquarters—Tribal share: "program formula pool"—to include all funds identified in Form A, and such additional funds which the IHS may make available on a program formula basis during the year based on the programs accepted for this allocation in Form A.	$69,078
ISDM support on the "tribal shares" identified above including funding from both Headquarters and Area Office as identified in Form A.	$80,782
Subtotal - Tribal Shares	$294,359
TOTAL COMPACT FUNDING	$7,291,926

These amounts are subject to additions for Medicare, Medicaid, other reimbursements, and for new funds received during the term of this Agreement including amounts that have historically been distributed as non-recurring funds under Title I of the Indian Self-Determination and Education Assistance Act, as amended.

(b) Indirect costs shall be negotiated for this Annual Funding Agreement in compliance with section 106(d)(l) and 106(e) of the Indian Self-Determination and Education Assistance Act, as amended, and the amounts set forth in the preceding shall be adjusted accordingly.

AFA. The parties have agreed to do so through a redesignation of the Tribes' CHSDA boundaries to include certain adjacent counties, a matter which is in process at the time of execution of this AFA.

The Tribes' share of Headquarters equipment replacement funds shall be subject to renegotiation based upon the Tribes' audit of the square footage and workload data used in the formula for distribution of those funds.

(c) The parties agree that the Tribes have a right to receive a percentage of the Management Initiative Fund of the Headquarters' budget based on the Tribal Size Adjustment Formula to the extent funds remain in this account as of September 1, 1997. Any balance in the fund as of September 1, 1997 shall be paid to the Tribes under this Agreement on the basis of the Tribal Size Adjustment Formula.[5]

(d) Once determined, the proportional share of the Tribes' mandatories, deferred services and any other funding for which the Tribes are eligible will be provided as an amendment to this Annual Funding Agreement.

Section 5—Method of Payment.

(a) Payment Schedule. Except as provided in subsections b, c, and d of this section, all funds identified in Section 4 of this Agreement shall be paid to the Tribes, in accordance with Article II, Section 4.a. of the Compact, payment to the Tribes to be made as follows:

> One annual payment in lump sum to be made by wire transfer, within 20 working days of apportionment.[6]

(b) Availability of Headquarters Tribal Shares. The Indian Health Service shall provide 100 percent the negotiated amount of tribal shares from Headquarters, and 100 percent of tribal shares negotiated from the Phoenix Area Office. No

---

[5] The Tribes continue to protest the refusal of the Indian Health Service to distribute the entire Management Initiative Fund using the Tribal Size Adjustment formula.

[6] It is the Tribes' position that payment should be made to the Tribes within ten days of apportionment. The Tribes believe that time is of the essence in this respect, and note that while the Indian Health Service is able to pay its employees and make other expenditures immediately upon commencement of the new fiscal year, prior to full apportionment, the Tribes are required to await receipt of their lump sum payment before they have access to new fiscal year funds from which to pay tribal health employees and to incur expenditures in the new fiscal year.

less than 90% of the amount due for Headquarters tribal shares will be paid to the Tribes in their initial lump sum payment, with the remaining amount (if any) to be paid to the Tribes within 90 days of apportionment.

(c) IPAs/MOAs. The Tribes have determined that they wish to carry out certain of their responsibilities to provide programs, activities, functions or services, (i.e. salaries of IPA/MOA employees) included in this Annual Funding Agreement utilizing services, personnel, supplies or other resources of the Federal Government, as permitted by law. Due to unique circumstances involving the historic funding pattern of the Owyhee Service Unit, including its historic financial deficit despite persistent vacancies in the Service Unit, the parties in fiscal year 1996 developed a separate Memorandum of Agreement to address how to manage funds covering tribal utilization of federal personnel, services, supplies and the like. The parties shall continue to implement this section of the AFA pursuant to the terms of the Memorandum of Agreement, subject to any amendments thereto to which the parties may agree, provided that, prior to the distribution of any FY 1997 IPA/MOA funds to the Tribes the Indian Health Service has received full reimbursement for all FY 1996 IPA/MOA costs in accordance with the Memorandum of Agreement. In addition, the parties agree that, by October 31, 1996, the payment, invoicing, reimbursement and reconciliation process will be revised in a manner acceptable to the parties, and any such revisions shall be memorialized as an amendment to the Memorandum of Agreement.

(d) Periodic Payments. Payment of funds otherwise due the Tribes under this Agreement, which are added or identified after the initial payment is made, shall be made promptly upon request of the Tribes by check or wire transfer.

(e) Interest on late payments. Interest shall be paid on late payments as specified in the Prompt Payment Act to the extent not contrary to law.

Section 6—Retained Shares

The parties agree that the Indian Health Service shall retain the Tribes' shares for the following programs, services, functions or activities:

(a) portions of the Phoenix Area Human Resources and Financial Management offices relating to the employment of individuals covered by IPAS or MOA's;

(b) IRM and RPMS related functions; and

(c) sanitation facilities,

all as set forth in the attached Appendix A.

Section 7—Contract Support Funding.

The Tribes shall be entitled to contract support funding on the same basis as tribes and tribal organizations who contract under Title I of the Act, pursuant to the provisions of section 106(a)(2) of the Act. The Tribes will be entitled to share appropriate mandatory and other inflation increases in common with all other tribes, such amounts, if any, to be added to the Tribes' program base (which does not include contract support) established in this Agreement. Indirect contract support funds, based on the application of the Tribes' negotiated indirect cost rate to the base, shall be added to the Tribes' program base for FY 1997 and may be increased in subsequent years if required by the Tribes' negotiated indirect cost rate. To this amount shall be added all direct contract support funds to which the Tribes are entitled under section 106(a) of the Act. The Tribes will be entitled to contract support funds on Area and Headquarters tribal shares to the full extent specified in section 106(a)(2) of the Act and related provisions.

Section 8—Sufficiency of Service Unit Funding. The Phoenix Area Office has expressed the view that the base service unit funding included herein for operation of the Owyhee Hospital is sufficient to operate the hospital within

budget at full staffing of professional and managerial staff. The Tribes have expressed skepticism based upon their own professional assessments.

The Tribes have requested that if, as a result of full recruitment at the Owyhee Hospital in FY 1997, or as a result of unforeseen circumstances, the Tribes experience a shortfall, the Indian Health Service should agree to fund such shortfall, provided that the Tribes have first furnished the Service with a full accounting of the circumstances giving rise to the shortfall and have satisfied the Service that the Tribes have managed their available funds prudently. The Indian Health Service has declined to make this agreement in advance, but has agreed to reserve the authority to address such a contingency on an emergency basis as the circumstances warrant.

For the record, the Phoenix Area Office takes the position that the appropriation process nationally funds only approximately 60% to 70% of need. Further, the Phoenix Area Office notes that in FY 1994 and FY 1995 it increased the recurring base funding to the Owyhee Service Unit. It is the position of the Phoenix Area Office that the Owyhee Service Unit does not experience funding shortfalls different in kind from that experienced by other service units.

Section 9—Adjustments.

(a) Due to Congressional Actions. The parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to the availability of appropriations.

(b) Financial Adjustments to Annual Funding Agreement during Review Period. It is recognized that since self-governance is a demonstration project, there may be errors in calculations, or mistakes in defining the tribal population, number of tribes, recurring base, or definitions of other variables which determine tribal shares which may need to be renegotiated during the review period under Section 303(a)(9)

of the Indian Self-Determination and Education Assistance Act, as amended. Both parties agree to take prompt action to correct such errors as they are identified.

Section 10—Program Rules.

The Tribes will make every effort to carry out the health programs, activities, functions, and services in this Agreement in compliance with:

JCAHO Standards for Hospitals and Ambulatory Care Facilities, as applicable.

Section 11—Property.

The Tribes shall retain title to all property purchased with funds provided under this Annual Funding Agreement. As provided in section 105(f) of the Act, all property referred to in this paragraph, together with all property previously transferred to the Tribes by the Indian Health Service, shall hereafter be replaced by the Indian Health Service on the same basis as if title to such property were in the Indian Health Service.

Section 12—Prior Annual Funding Agreements

Unless expressly stated otherwise, nothing in this Annual Funding Agreement shall be construed as relieving either party of any obligation undertaken under prior annual funding agreements between the parties.

Section 13—Headquarters and Area Responsibilities.

Unless funds are specifically provided from Headquarters or Area, Headquarters and Area retain all programs, activities, functions, and services, and the Tribes, their members, and their service unit population will not be denied access to, or services from, Headquarters or Area.

Section 14—Access to Programs, Services, Functions and Activities not Funded Under This AFA

To the extent funds are retained by the Indian Health Service, or are not currently being made available for distribution to the Tribes under this AFA, the Tribes shall retain access to all programs, services, functions and activities supported by such funds, in the same manner as if the Tribes' programs had remained under federal administration and to the same extent the Tribes would have received such services if they were not participating in the Self-Governance Demonstration Project.

Section 15—Amendment or Modification of this Agreement.

(a) Form of Amendments. Except as otherwise provided by this Agreement, the Compact, or by law, any modifications to this Agreement shall be in the form of a written amend ment and shall require written consent of the Tribes and the United States.

(b) Services from IHS. Should the Tribes determine that they wish the Indian Health Service to provide programs, activities, functions or services included in this Annual Funding Agreement for which funding has been identified but not yet paid, the parties shall negotiate an amendment to the Annual Funding Agreement to reflect the transfer of responsibilities from the Tribes back to the Indian Health Service and the pro-rata share of funding for that program, activity, function or service shall be retained by the Indian Health Service.

(c) Due to Addition of New Programs. Should the Tribes determine that they wish to provide a program, activity, function or service of the Indian Health Service not included in this Annual Funding Agreement, the Tribes shall submit a proposal to the Indian Health Service to provide such program, activity, function, or service. Such proposals shall be reviewed by the Indian Health Service in accordance with the contract proposal review process and timelines set forth in

Section 102 of the Indian Self-Determination and Education Assistance Act, and the funding provisions of section 106(a) of Title I and of Title III, as amended. Proposals submitted pursuant to this section shall be treated as a request for amendment to the Annual Funding Agreement and, once approved by the Indian Health Service, shall be added to the Agreement by amendment.

(d) Due to Availability of Additional Funding. The Tribes shall be eligible for any increases in funding or funding for new programs to which they would have been eligible had they been administering programs under a self-determination contract, rather than under the Shoshone-Paiute Tribal Health Compact and this Agreement, and for any other funds that are not restricted by appropriations language for which any tribe or tribal organizations may be eligible, including any new funds appropriated for Indian Health Service Headquarters and funds passed to the Phoenix Area as recurring or non-recurring funds, and this Agreement shall be amended to provide for timely payment of such new funds to the Tribes.

Section 16—Severability.

(a) Except as provided in this section, this Agreement shall not be considered invalid, void or voidable if any section or provision of this Agreement is found to be invalid, unlawful or unenforceable by a court of competent jurisdiction.

(b) If any section or provision of this Agreement is found to be invalid, unlawful or unenforceable by a court of competent jurisdiction, either party may, at its option, treat this Agreement as invalid, void, voidable, in accordance with the provisions of the Compact.

(c) In the event that the parties decide to treat the Agreement as invalid, void or voidable, under subsection (b) of this section, the parties will seek agreement to amend, revise, or delete any such invalid, unlawful or unenforceable sections or provision, in accordance with the provisions of the Compact.

Section 17—Effective Date and Duration.

This Annual Funding Agreement shall become effective on October 1, 1996, and remain in effect through the remainder of the 1997 federal fiscal year or until a successor agreement is negotiated and becomes effective pursuant to Article II, Section 12 of the Compact.

UNITED STATES OF AMERICA
SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES

By: /s/ [illegible]
Director, Indian Health Service

Date: July 2 1996

DUCK VAJLEY SHOSHONE PAIUTE TRIBES

By: /s/ James Paiva
JAMES PAIVA, Tribal Chairman
Date: 7-8-96

[See JA Vol. II, PART 1 for attached
Appendix A (funding tables)]

P.O. Box 219 Owyhee, Nevada 89832-0219 (702) 757-3211

September 20, 1996

VIA FEDERAL EXPRESS
AND CERTIFIED U.S. MAIL

Dr. Michael H. Trujillo, Director
Indian Health Service
Department of Health and Human Services
5600 Fishers Lane, Room 6A-05
Rockville, Maryland 20857

Re: Enclosed Contract Disputes Act claim for 1996 contract support costs

Dear Dr. Trujillo:

The Duck Valley Shoshone-Paiute Tribes hereby claim the right to immediate payment of $1,667,566 (ONE MILLION, SIX HUNDRED SIXTY-SIX THOUSAND, FIVE HUNDRED SIXTY-SIX DOLLARS) (subject to adjustment up or down according to the Tribes' indirect cost rate) due and owing to the Tribe under the provisions of Amendment No. 1 to the Fiscal Year 1996 Annual Funding Agreement for the Shoshone-Paiute Tribal Health Compact. This claim is submitted pursuant to the provisions of the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* §§ 110(d) and 403(h) the Indian Self-Determination Act as amended.

As amended by Amendment No. 1, the 1996 Fiscal Year Annual Funding Agreement obligates the United States to

pay the Tribes the above-stated sum "in approved and agreed recurring direct ($494,517) and non-recurring indirect ($1,173,149) contract support funds" associated with the Tribes' operation of the Owyhee Hospital and all related programs and the Tribes' operation of the Managed Care Program. (See 1996 AFA, Footnote 1 (attached as Exhibit A), as amended by Amendment No. 1 paragraph 1 (attached as Exhibit B)).

To date, the Tribes have received none of this funding. We understand the funds have not been provided because the IHS believes it has no obligation to expend funds that were not expressly appropriated for this purpose, and because other tribes' claims have already exhausted the amount so appropriated. The Tribes believe the IHS is mistaken and that the amount must be paid to the Tribes from the IHS' general $2.3 billion FY 1996 appropriation.

This claim is supported by the Tribes' Fiscal Year 1996 Annual Funding Agreement (Exhibit A), and Amendment No. 1 to the Annual Funding Agreement (Exhibit B).

Please recall that, under the terms of the Prompt Payment Act, 31 U.S.C. § 3901 et. seq. and the Contract Disputes Act, 41 U.S.C. § 611, interest is accruing on the amount due.

We would appreciate your prompt decision on this claim.

Sincerely,

/s/ James Paiva
JAMES PAIVA
Chairman

cc: Paula Williams, Director,
Office of Tribal Self-Governance

Lloyd Miller, Esq.

CERTIFICATION OF CONTRACT DISPUTES ACT CLAIM

I, James Paiva, Chairman of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, hereby certify as follows on behalf of the Tribes:

(1) the above claim is made in good faith;

(2) the supporting data are accurate and complete to the best of my knowledge and belief;

(3) the amount requested accurately reflects the adjustment for which the Tribes believe the government is liable; and

(4) I have been duly authorized to certify this claim on behalf of the Duck Valley Shoshone-Paiute Tribes.

DATED this 20th day of September, 1996.

Duck Valley Shoshone-Paiute Tribes

By /s/ James Paiva
JAMES PAIVA
Tribal Chairman

CERTIFICATE OF DELIVERY

I, Helen Hernandez, swear or affirm under penalty of perjury:

1. I am an employee of the Duck Valley Shoshone-Paiute Tribes.

2. I sent the originals of this document, together with the referenced Exhibits A and B, via Federal Express and certified U.S. mail to:

Dr. Michael H. Trujillo, Director
Indian Health Service
Department of Health and Human Services
5600 Fishers Lane, Room 6A-05
Rockville, Maryland 20857

on the 26 day of September, 1996.

3. On the same date I also sent a copy of the same documents, via Federal Express and certified U.S. mail, to:

Paula Williams, Director
Office of Tribal Self-Governance
Indian Health Service
5600 Fishers Lane, Room 6A-05
Rockville, Maryland 20857

Dated this 26 day of September, 1996.

/s/ Helen Hernandez
HELEN HERNANDEZ

Office of the Tribal Chairman
Shoshone-Paiute Tribes
of the Duck Valley Indian Reservation
P.O. Box 219, Owyhee, NV 89832

Telephone: 702/757-3211 Facsimile: 702/757-3212

September 23, 1997

VIA FEDERAL EXPRESS #4101619745
and CERTIFIED US MAIL #P243931542

Dr. Michael H. Trujillo, Director
Indian Health Service
Department of Health & Human Services
5600 Fishers Lane, Room 6A-05
Rockville MD 20857

RE: Enclosed Contract Disputes Act Claim for 1997 Contract Support Costs

Dear Dr. Trujillo:

The Duck Valley on-Paiute Tnbes hereby claim the right to immediate payment of $4,714,611.00 (adjustment up for down according to the Tribes' indirect cost rate) due and owing to the Tribes under the provisions of the Fiscal Year 1997 Annual Funding Agreement for the Duck Valley Shoshone-Tribes Health Compact. This claim is submitted pursuant to the provisions of the contract Disputes Act, 41 U.S.C. § 601 *et seq*. §§ 110 (d) and 403 (h) the Indian Self-Determination Act as amended.

The 1997 Fiscal Year Annual Funding Agreement obligates the United States to pay the Tribes the above-stated sum "in direct and indirect contract support funds" associated with the Tribes' operation of the Owyhee Hospital and all related programs and the Tribes' operation of the Managed Care Program. (*See* 1997 AFA, Footnote 1 [attached as Exhibit A].) This sum includes $1,667,666.00 claimed by the Tribes under the Contract Disputes Act last year, for recurring direct

($494,517.00) and indirect ($1,173,149.00) contract support the Tribes claimed should have been paid in fiscal year 1996. By including that amount in this claim, the Tribes do not relinquish their prior claim for that amount and any interest and penalties that may be owed thereon under the Contract Disputes Act or the Prompt Payment Act.

To date, the Tribes have received none of this funding. We understand the funds have not been provided because the IHS believes it has no obligation to expend funds that were not expressly appropriated for this purpose, and because other tribes' claims have already exhausted the amount so appropriated. The Tribes believe the IHS is mistaken and that the amount must be paid to the Tribes from the IHS' general FY 1997 appropriation.

This claim supported by the Tribes' Fiscal Year 1997 Annual Funding Agreement (Exhibit A).

Please recall that, under the terms of the Prompt Payment Act, 31 U.S.C. § 611, interested is accruing on the amount due.

We would appreciate your prompt decision on this claim.

Sincerely,

/s/ James Paiva
JAMES PAIVA
Tribal Chairman

hlh

Enclosures

XC: Paula Williams, Director, Office of Tribal Self-Governance
Don Davis, Phoenix Area Director
Thomas L. Austin, Tribal Consultant
Lloyd Miller, Tribal Attorney
Chrono

CERTIFICATION
OF CONTRACT DISPUTES ACT CLAIM

I, James Paiva, Chairman of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, hereby certify as follows on behalf of the Tribes:

1. The above claim is made in good faith;
2. The supporting data are accurate and complete to the best of my knowledge and belief;
3. The amount requested accurately reflects the adjustment for which the Tribes believe the government is liable; and
4. I have been duly authorized to certify this claim on behalf of the Duck Valley Shoshone-Paiute Tribes.

Dated this 23rd day of September, 1997.

DUCK VALLEY SHOSHONE-PAIUTE TRIBES

By: /s/ James Paiva
JAMES PAIVA, Tribal Chairman

CERTIFICATE OF DELIVERY

I, Helen Hernandez, swear or affirm under penalty of perjury:

1. I am an employee of the Duck Valley Shoshone-Paiute Tribes.
2. I sent the originals of this document, together with the referenced Exhibit A, via Federal Express and certified U.S. mail to:

   Dr. Michael H. Trujillo, Director
   Indian Health Service
   Department of Health and Human Services
   5600 Fishers Lane, Room 6A-05
   Rockville, Maryland 20857

on the 23rd, day of September, 1997.

3. On the same date I also sent a copy of the same document and exhibit, via Federal Express and certified U.S. mail, to:

   Paula Williams, Director
   Office of Tribal Self-Governance
   Indian Health Service
   Parklawn Building
   5600 Fishers Lane, Room 5A-55
   Rockville, Maryland 20857

4. On the same date I sent a copy of the same document and exhibit via U.S. mail to:

   Don Davis
   Phoenix Area Director
   40 North Central Avenue Suite 600
   Phoenix, Arizona 85004-4424

Dated this 23rd day of September, 1997

_____
Helen Hernandez

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 99-092-S
(Class Action)

CHEROKEE NATION OF OKLAHOMA; and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

UNITED STATES; DONNA E. SHALALA, Secretary of the United States Department of Health and Human Services; and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,

Defendants.

AFFIDAVIT OF BILL THORNE

BILL THORNE, being first duly sworn upon his oath, deposes and says:

1. I am an enrolled member of the Cherokee Nation and the Executive Director of the Cherokee Nation Health Service.

2. I have more than twenty years experience in the field of health management in both the public and private health care settings. Prior to working for the Cherokee Nation, I was employed by the Indian Health Service ("IHS") where I served as Administrator of the W.W. Hastings Hospital in Tahlequah, Oklahoma from 1978 to 1984.

3. I have been employed in my current position since April 1997. As Executive Director of the Cherokee Nation Health

Service, I am responsible for all aspects of the Nation's health care delivery operations. I am thoroughly familiar with the history and structure of the Cherokee Nation and have direct personal knowledge of the operations of the Cherokee Nation Health Service.

4. The Cherokee Nation has the second largest population of Native Americans in the United States. Tribal enrollment increased from 170,426 members in 1995 to 189,273 members in 1997, and tribal membership throughout the United States is currently estimated to be more than 200,000.

5. Approximately 91,000 Cherokee tribal members live within the Cherokee Tribal Jurisdictional Service Area ("TJSA"), a 7,000 square mile region in the northeast corner of Oklahoma. Fourteen counties, in whole or part, comprise the TJSA. In alphabetical order, they are Adair, Cherokee, Craig, Delaware, Mayes, McIntosh, Muskogee, Nowata, Ottawa, Rogers, Sequoyah, Tulsa, Wagoner and Washington counties.

6. Tahlequah is the capital of the Cherokee Nation, and it is located in Cherokee County in the southeastern section of the TJSA. The Cherokee Nation's principal government and business office complex is also located in Tahlequah, but tribal services are provided throughout the TJSA.

7. The Cherokee Nation is a federally recognized Indian tribe with a democratic, tripartite form of government operated under a tribal constitution. The Cherokee Nation's present Constitution was ratified in 1976, but the Nation's first modern constitutional government was established through a convention of tribal members in 1827. The Nation's Constitution provides for an executive branch, a legislative branch and a judicial branch of tribal government and relies on a modified "checks and balances" system to distribute power among these three government branches.

8. The Principal and Deputy Principal Chiefs are the Cherokee Nation's highest elected executive officers. The Chiefs and their appointed staff are responsible for performing the executive functions of tribal government and operating all tribal departments, services and programs, including the Cherokee Nation Health Service.

9. The Deputy Principal Chief is also the "President" of a fifteen-member Tribal Council and serves as its chair for official monthly meetings. The fifteen Tribal Council members are elected from nine voting districts. The Tribal Council is the legislative branch of tribal government. The Tribal Council has the power to pass tribal laws and ordinances, regulate tribal businesses and appropriate funds for use by the executive departments.

10. The Cherokee Nation executive branch is organized into four major divisions—Health Services, Education and Human Services, Community Development, and Financial and Asset Management.

11. The Principal Chief appoints Executive Directors for each major tribal department, including the Cherokee Nation Health Service. These directors and their staff are responsible for managing the departments and programs under their control in accordance with established tribal policies.

12. The Cherokee Nation has approximately 1,700 tribal employees, making it one of the largest employers in northeast Oklahoma. Of this number, the Cherokee Nation Health Service employs approximately 560 people, ranging from physicians, dentists, pharmacists, nurses and home health aides to administrators, billing clerks, secretaries and technicians.

13. Within the TJSA, there are six outpatient clinics, two hospitals, a mobile health unit and an EMS facility. The six outpatient clinics are located in Stilwell (Adair county), Sallisaw (Sequoyah county), Jay (Delaware county), Muskogee (Muskogee county)[1], Nowata (Nowata county) and Salina (Mayes county). The W.W. Hastings Indian Hospital is located in Tahlequah in Cherokee County, and the Claremore Indian Hospital is located in Rogers County. The EMS facility is located in Tahlequah in Cherokee County. These clinics, hospitals, and other facilities comprise the Cherokee Rural Health Network (CRHN), and they provide a wide range of basic health care services to more than 250,000 registered patients.

14. Starting in 1980, the Cherokee Nation gradually began to assume responsibility for operating IHS clinics and most IHS health care programs within the TJSA under the authority of the Indian Self-Determination and Education Assistance Act ("ISDEA"). The ISDEA allows the Cherokee Nation to assume operations of IHS programs serving Cherokee citizens and other eligible beneficiaries within the TJSA. The Cherokee Nation originally operated the programs under various self-determination contracts with the IHS. However, beginning in fiscal year 1994 (October 1, 1993), the Nation has operated these health programs under the terms of its Self-Governance Compact and annual funding agreements ("AFAs") with the Secretary of the Department of Health and Human Services.

15. During the 1990s, the Cherokee Nation Health Service significantly expanded the number of IHS programs it administers, first under self-determination contracts and later under its Compact and AFAs. The Nation began construction, and later assumed operation, of the Redbird Smith Health Center located in Sallisaw (Sallisaw Clinic) starting in FY 1992. The Nation also assumed operation of the Wilma P. Mankiller Health Center located in Stilwell (Stilwell Clinic)

---

[1] The Muskogee clinic is actually located just outside the TJSA in Creek territory, but it is operated by the Cherokee Nation with the permission of the Muskogee (Creek) Nation of Oklahoma and the IHS.

in FY 1994; the IHS contract health services outpatient program (CHS-OP) in FY 1995; and the IHS contract health services inpatient program associated with the IHS Hastings Hospital (CHS-IP) in FY 1997.

16. The Cherokee Nation takes great pride in operating and administering these federal health care programs for the benefit of Cherokee citizens and other eligible beneficiaries within the TJSA. The Nation strives to provide the highest level of health care services with the limited financial resources at its disposal. Unfortunately, the IHS has failed to properly fund the most recently assumed clinics and health care programs, and this funding shortfall has only exacerbated an already severe crisis in Cherokee health care funding.

17. Historically, Native care health services in the Oklahoma service area have received the lowest levels of federal funding of any of the IHS service areas. For instance, in 1998, the Oklahoma area received only $856 in per capita funding while such areas as Portland and Nashville received $1,698 and $1,800 in per capita funding respectively. Making matters worse, the Cherokee Nation has historically received less federal funding per capita than other Indian tribes in the Oklahoma area.

18. Given the great unmet Native health care needs in Oklahoma and particularly in the Cherokee area, it has been one of my highest priorities as Executive Director to preserve, protect and maximize IHS program funding for direct health care services. However, in order to avoid using direct program funding to pay for equally critical and necessary administrative and support services, the Cherokee Nation Health Service must receive the full amount of contract support cost funding (both direct contract support costs and so-called "indirect costs") to which it is legally entitled.

19. Unfortunately, the IHS has refused to provide any contract support cost ("CSC") funding for the two clinics and

contract health care programs more recently assumed by the Nation. Under the terms of Cherokee's Compact and FY 1997 AFA, the Nation operated five rural outpatient clinics (the Muskogee clinic was not established until FY 1998). It also operated the inpatient and outpatient contract health programs associated with the Hastings Hospital and the outpatient contract health program associated with the Claremore Hospital.

20. Under its Compact and FY 1997 AFA, the Cherokee Nation received total direct program funding of $32,587,392 to operate the five outpatient clinics and all other IHS-funded health care programs. The Cherokee Nation requested, and the IHS Oklahoma Area Office approved, specific amounts of direct recurring and nonrecurring CSC and nonrecurring indirect CSC for each of these programs. The Cherokee Nation also proposed (and the Office of Inspector General later approved) an indirect cost rate of 14.93 percent.

21. However, based on an internal CSC policy which the Cherokee Nation has always maintained was unlawful, the IHS refused to pay any CSC funding, either for direct or indirect costs, for the Sallisaw Clinic, the Stilwell Clinic, CHS-OP or CHS-IP because these programs were not high enough on the IHS "queue" to receive a portion of the so-called "ISD Fund."

22. The IHS paid the Cherokee Nation only $1,656,151 in indirect costs in FY 1997. In contrast, the IHS paid the Cherokee Nation $1,705,925 in indirect costs in FY 1996, a year when the Nation's indirect rate was only 12.2 percent and its direct cost base was approximately $8,000,000 less than in FY 1997.

23. During negotiations over the FY 1997 AFA, the IHS took a particularly harsh position with regard to CSC funding. Despite prior year agreements, the IHS flatly refused to agree to pay indirect costs in accordance with the Nation's indirect rate agreement. In FY 1997, the IHS rejected AFA language

used in prior fiscal years which stated that "[t]he amount of funds allocated to the Nation under this Annual Funding Agreement for Indirect Cost Funding shall be established and paid based upon the Nation's approved Indirect Cost Agreement for 1996." The IHS agreed only to pay a specified "minimum amount of funds allocated to the [N]ation." In an endnote to the FY 1997 AFA, the Nation memorialized its disagreement with IHS's decision to pay the Nation indirect costs without regard to the Nation's indirect cost rate agreement.

24. In the end, IHS disregarded all four newer programs as part of the Cherokee Nation "direct cost base." To the extent it actually multiplied the Nation's indirect rate by this unlawfully reduced base, it never even paid the resulting under-calculated amount. Instead, the IHS paid the Nation only the "minimum amount" described in the FY 1997 AFA.

25. Providing adequate funding to met the health care needs of Native Americans is part of the federal government's trust responsibility toward Indian tribes. The federal funds at issue in this litigation pay for critical and necessary health care programs. These programs primarily serve a remote and needy rural population which does not have access to a wide range of health care services.

26. If CSC funding is not provided at levels mandated by federal law, the Cherokee Nation Health Service is forced to divert direct health care funding to pay for necessary administrative and contract support costs. The Nation must perform these administrative functions to comply with other federal laws which require competent accounting and administration of our health care programs.

27. For this reason, the CSC shortfall in FY 1997 effectively reduced the Nation's direct health care funding dollar for dollar to the extent of the shortfall. The Nation's medical programs, and ultimately our patients, suffered directly as a result of these unlawful shortfalls in CSC funding.

28. In the remainder of this Affidavit, I will briefly describe the clinics, services and health care programs operated by the Cherokee Nation Health Service.

29. The Wilma P. Mankiller Health Center in Stilwell is the largest Cherokee-operated outpatient clinic, and it offers the most comprehensive range of medical services. The Clinic provides basic outpatient medical care, a public health nursing service, a dental program, optometry, radiology, mammography, behavioral health services, a medical laboratory, a pharmacy, a community nutrition program, and an inpatient/outpatient contract health care program. Patient visits at the Stilwell Clinic have increased steadily over the last three years. According to the Resource-based Patient Management System (RPMS), an IHS-maintained data base, patient visits rose from 52,103 in FY 1996 to 59,694 in FY 1997 to 67,356 in FY 1998.

30. The Redbird Smith Health Center located in Sallisaw was the first clinic to be constructed and operated entirely under the direction of the Cherokee Nation. According to the RPMS, patient visits at the Redbird Smith Clinic rose from 42,491 in FY 1996 to 47,371 in FY 1997 to 52,563 in FY 1998. The Clinic offers outpatient medical services, behavioral health, public health nursing, laboratory, pharmacy, dental, community nutrition and contract health care.

31. The Sam Hider Jay Community Clinic is based in a former community hospital, which the Nation purchased in 1989. The Clinic averages about more than 25,000 outpatient visits per year and provides outpatient care to an active user population of over 8,400. Services provided include outpatient medical, dental, public health nursing, laboratory, pharmacy, radiology, mammography, community nutrition and contract health care.

32. The Nowata Primary Health Care Clinic is housed in modular units located in a Nowata industrial park. Services

include outpatient medical, public health nursing/community health representatives, a laboratory, a pharmacy and contract health care. The Clinic averages more than 14,500 outpatient visits per year and has an active user population of over 4,100.

33. The A-mo Community Clinic in Salina is housed in a new building built by the Cherokee Nation at its own expense in 1995. The Clinic averages about 22,500 outpatient visits per year. It offers outpatient medical, public health nursing, laboratory, pharmacy, community nutrition, radiology and optometry.

34. The Muskogee Health Center operates in a space leased by the Nation near the Muskogee Regional Medical Center. The Center averages more than 16,800 visits per year and has an active user population of at least 3,400. Its principal focus is maternal and child health care, but it also offers a full-time general practitioner, a family nurse practitioner, a public health nurse, a dietician, behavioral counselors, and a pharmacist.

35. The Cherokee Nation purchased a Mobile Health Unit with federal funds in 1998. The Mobile Health Unit is the size and shape of a large city bus, and it offers basic medical care and health screening to four rural towns in the northern region of the Cherokee TJSA, Bartlesville, Vinita, Collinsville, and South Coffeyville. Directed by a physician in the Nowata Clinic, the Mobile Health Unit is staffed by a family nurse practitioner, a licensed practical nurse and an emergency medical technician/driver.

36. This Mobile Health Unit and the six outpatient clinics represent, for the most part, the only local health care resources for the residents of rural and remote counties within the TJSA, whether they are Native or non-Native. In the more remote areas, the Cherokee Nation Health Service also provides health care to non-Native patients on a fee-for-service basis.

37. In addition to these outpatient facilities, the Nation operates an Emergency Medical Services (EMS) facility in Tahlequah which provides 24-hour emergency medical services to patients of Hastings Hospital. The EMS facility also provides transport service throughout the 14-county area; land, water and specialty rescue; disaster and mass casualty management; first-responder and other EMS training; and emergency ambulance service within Cherokee County. As part of its ESM [sic] Program, Cherokee Nation Health Services also established the first "911" emergency calling system ever provided to residents in Cherokee County.

38. The Rural Eye Program is provided through an agreement between the Cherokee Nation Health Service and Northeastern State University College of Optometry. The Program's emphasis is to detect and treat vision problems common to Native Americans, such as the complications resulting from diabetes and glaucoma. The Program includes a mobile eye clinic to provide eye care to elderly patients or others without transportation in the TJSA.

39. The Public Health Nursing Program provides community outreach programs to encourage basic health care and healthy living. The Program addresses the environmental, psychosocial, economic and educational needs of the patient, as well as the influences which affect the patient's overall health status. Community health representatives, working as part of the Public Health Nursing Program, provide home visits for assessment, referral and liaison services between patients and the Cherokee health care system, prevention education, chronic disease management and cultural activities designed to enhance positive group identity.

40. Behavioral Health Services provides outpatient counseling for personal difficulties ranging from blended family concerns to depression and an inpatient facility for youth experiencing substance abuse problems. Along with individual therapy, the program offers family therapy, parenting edu-

cation, domestic violence intervention, child abuse screening and psychological testing.

41. Contract Health Services helps eligible beneficiaries who require specialty care that is not directly available from the clinics and hospitals. High risk obstetrics, cancer treatment and transplants are some of the specialty care areas which are typically referred out to contract physicians and funded under the Contract Health program. The Cherokee Nation Health Service is responsible for the administration of outpatient contract health services (CHS-OP) in Washington, Nowata, Craig, Mayes, Delaware and Muskogee counties. It is responsible for both inpatient (CHS-IP) and outpatient contract health services (CHS-OP) in Cherokee, Adair, and Sequoyah counties.

42. The Cherokee Nation Health Service contracts with over 250 specialty care physicians and health facilities to provide a variety of specialty care treatments ranging from specialized radiology and other screening to orthopedics and cardiology. More than 20 distinct disciplines are represented in this "micro-network" of contract providers.

43. This specialty care provider network represents an innovative and cost-saving measure that the Cherokee Nation Health Service initiated to maximize its federal contract health care funding. When the federal government administered the CHS-IP and CHS-OP programs within the Cherokee TJSA, the IHS had no preexisting contractual relationships with specialty care providers. As a result, the IHS typically had to pay much higher consultation and treatment rates than the Cherokee Nation now pays for the same services.

44. Nevertheless, because the Cherokee health budget is so severely underfunded, we cannot accommodate the needs of every patient for contract health care. The Cherokee Nation Health Service has developed medical priority lists for inpatient and outpatient contract health services. It developed

these lists with the advice and concurrence of IHS physicians working at the Hastings and Claremore Hospitals. The priority lists are used to determine which contract health referrals will be authorized for payment. Many requests for contract health care are never approved due to a lack of overall program funding. Some services, such as "urgent diagnostic studies," are funded at times and not funded at other times, depending on the amount of contract health funding expended at a particular point in the budget cycle.

45. According to RPMS figures, contract health denials at the Stilwell clinic over the last five years were highest in FY 1997. The contract health staff at the Stilwell Clinic denied 127 specialty care requests in FY 1995, 268 requests in FY 1996, 592 requests in FY 1997 and 440 requests in FY 1998. So far in FY 1999, the Stilwell staff has been forced to deny 472 contract health requests for specialty care.

46. In addition to these IHS-funded programs, the Cherokee Nation Health Service is also responsible for operating several other medical, social and health-related programs.

47. The Women, Infants & Children Program (WIC) is funded through the federal Department of Agriculture. It serves low and moderate income pregnant, breast-feeding and postpartum women as well as infants and children up to five years of age who have been determined to be at nutritional risk. Women receive supplemental foods for themselves and their children, along with nutrition education counseling and early access to prenatal care to ensure a healthy pregnancy and baby.

48. The Healthy Nation program, funded by the Robert Wood Johnson Foundation, provides education in proactive wellness through activities in schools, health fairs, clubs, camps and a host of other programs. The program emphasizes cultural values, physical fitness, prevention, safety and disease management.

49. The Jack Brown Center is a 20-bed facility providing treatment for chemical dependency in a residential setting to Indian adolescents. The length of stay in the program ranges from 30 to 120 days. The center is staffed by 36 professionals and paraprofessionals, including a clinical psychologist.

50. The Cherokee Nation Cancer Registry, funded through a grant from the National Cancer Institute, gathers data on cancer incidence, treatment and survival rates. This data is used by the Nation to improve its health system.

51. The Diabetes Grant Program, funded by the IHS, provides foot care, dietary help, medication, and self-monitoring supplies to the more than 12,000 individuals in the TJSA who have been diagnosed with diabetes.

52. The Early Cancer Detection Program, funded by the Centers for Disease Control, provides screening, information, education, coordination and advocacy for the detection and treatment of breast and cervical cancer.

53. The Elder Services Coordination Project was developed to coordinate programs to meet the health and other needs of elders. It provides, among other services, assistance with housing, water sanitation, medical equipment, household safety devices, heating and air conditioning, and financial and family counseling.

54. These clinics, services and programs comprise the Cherokee Nation Health Service, a division of the Cherokee Nation.

55. Along with this Affidavit, I have provided several documents which generally describe Cherokee health programs and confidentially summarize patient data and health care statistics. These documents, identified as Plaintiffs Exhibits (48)-(62), were kept in the course of the Cherokee Nation Health Service's regularly conducted business activities and were not specially produced for this or any other

litigation. The information contained in these documents and brochures is true and accurate to the best of my knowledge and belief.

FURTHER YOUR AFFIANT SAYETH NOT

/s/ Bill Thorne
BILL THORNE, Executive Director
Cherokee Nation Health Service

Subscribed and sworn to before me this 19th day of July, 1999.

/s/ Bobbie L. Barr
BOBBIE L. BARR, Notary Public
Tahlequah, Oklahoma

My Commission expires July 06, 2003.

COMPACT OF SELF-GOVERNANCE
BETWEEN
THE UNITED STATES OF AMERICA
AND
CHEROKEE NATION

Article I—Authority and Purpose

Section 1—Authority. This agreement, denoted a Compact of Self-Governance (hereinafter referred to as the "Compact"), is entered into by the Secretary of the Department of Health and Human Services (hereinafter referred to as the "Secretary") for and on behalf of the United States of America pursuant to the authority granted by Title III of P.L. 93-638, as amended and by the Principal Chief of the Cherokee Nation for and on behalf of the Cherokee Nation by the authority of the Constitution (hereinafter referred to as the "Nation").

Section 2—Purpose. This Compact shall be liberally construed to achieve the following purposes:

(a) to carry out an unprecedented Self-Governance Demonstration Project, authorized by Title III of P.L. 93-638, as amended which is intended as an experiment in the areas of planning, funding and program operations within the Government-to-Government relationship between Indian tribes and the United States. In fulfilling his responsibilities under the Compact, the Secretary hereby pledges that the Department will conduct all relations with the Nation on a Government-to-Government basis. The Demonstration Project encourages experimentation in order to determine how to improve this Government-to-Government relationship and promote the perpetuation' of the Nation. The outcome of the Nations experiment cannot be known in advance and

each experiment as reflected in each specific Compact, binds no party beyond the terms of each specific Compact;

(b) to enable the Cherokee Nation to redesign services of the Indian Health Service under the terms set forth in the Compact; to reallocate funding for such services, according to its tribal priorities; to provide such services, as determined by its tribal priorities; to enhance the effectiveness and long-term financial stability of its tribal government; and to reduce the Federal bureaucracy; and

(c) to enable the United States to maintain its unique and continuing relationship with and responsibility to the Cherokee Nation through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of services to an effective and meaningful participation by the Indian people in the planning, conduct and administration of those services.

Section 3—Applicable Law and Forums. The duly enacted laws of the Nation shall be applied in the execution of this Compact and the powers and decisions of the Nation's Court shall be respected, to the extent that federal law, construed in accordance with the applicable rules of construction and Title III of P.L.93-638, as amended is not inconsistent.

Article II—Obligations of the Nation

Section 1—Consolidation. With the exception of the specific responsibilities of the United States identified and (retained in Article III, Section 3, and specified in Section 4 and footnoted in Section 2 and 3 of the attached Annual Funding Agreement) the Nation hereby consolidates and will perform the services within the General Budget Categories as provided in Section 2 and 3 of the Annual Funding Agreement incorporated herein in Article V, Section 1 of this

Compact. To the extent a service included within such Annual Funding Agreement is included within a contract or grant entered into pursuant to P.L. 93-638 or any other contract or grant exclusively with the Nation, or is subject to any obligation arising from such contract or grant, that contract or grant with the Nation is hereby canceled and the parties' obligations thereunder are hereafter governed by this Compact.

Section 2—Amount of Funds. The total amount of funds associated with the consolidation and redesign provided for in Section 1 of this Article which the Secretary shall make available to the Nation shall be established in the Annual Funding Agreement and amendments to the Annual Funding Agreement, between the Secretary and the Nation, which is incorporated in its entirety in this Compact and attached hereto as provided in Article V, Section 1.

Section 3—Tribal Programs. The Nation agrees to provide the services identified within the General Budget Categories in Section 2 and 3 of the Annual Funding Agreement.

Section 4—Reallocation. The Nation can reallocate funds from one service to another within, between, or among the Standard Indian Health Service Programs General Budget Categories contained within the Annual Funding Agreement Section 2 and 3 and shall be governed only by tribal law and procedure and shall not require the Secretary's consent. However, the Nation is not authorized to redesign, shift or transfer any funding for services which are subject to special restriction imposed by congressional directives.

Article III—Obligations of the United States

Section 1—Solemn obligation.

(a) Nothing in this Compact is intended to, nor should it be interpreted to, terminate, waive, modify, reduce or diminish in any way the solemn obligation of the United States to the Nation or individual Indians.

(b) If the United States' Designated Official determines from any source that safety is endangered by the Nation's action or inaction, the United States' Designated Official shall immediately notify the Nation of the specific concerns relative to the health program.

(c) If the solemn obligation is in imminent jeopardy, as defined in this subsection, the United States shall, upon written notice and a hearing on the record to the Nation, immediately take over the responsibility for the management of that imminently jeopardized solemn obligation, and may use a reasonable portion of funds remaining available for that purpose, notwithstanding any other provision of this Compact.

Section 2—Programs Retained. As specified in Section 4 of the Annual Funding Agreement, the United States hereby retains the services with respect to the Nation's that are not specially assumed by the Nation in the Annual Funding Agreement.

Section 3—Eligibility for New Services, Service Increases, and Non-recurring Resources. The Nation shall be eligible for new services; service increases, mandatories, population growth, health services priority system, contract support cost and others; and non-recurring resources; on the same basis as other tribes and the Secretary shall advise the Nation of the funding available for such services. To the extent that such services are subject to consolidation under Title III of P.L. 93-638, as amended they may be included within the Compact and Annual Funding Agreement by mutual agreement of the parties under Article IV, Section 22 and 27.

Section 4—Special Relief Programs. The United States will maintain the Nation's eligibility for special disaster relief and assistance programs as the same may from time to time become available, and shall retain responsibility to assist the Nation in responding to natural or other disasters, emergencies, and unforeseen acts of God.

Article IV—General Provisions

Section 1—Duration. The term of this Compact begins October 1, 1993 and shall extend thereafter throughout the times period authorized by Title III of P.L. 93-638, as amended and any subsequent amendments thereto.

Section 2—Effective Date. The Compact and attached Annual Funding Agreement are effective on October 1, 1993. In accordance with Title III of P.L. 93-638, as amended the Compact and Annual Funding Agreement, with signatures, shall be submitted by the Secretary and the Nation to the Select Committee on Indian Affairs of the United States Senate, to the Committee on Interior and Insular Affairs of the United States House of Representative at least ninety days before the effective date prescribed in Section 1. Successor Annual Funding Agreements shall be likewise submitted and made effective.

Section 3—Funding Amount. Subject only to the appropriation of funds by the Congress of the United States, and to adjustments pursuant to section 106(b) Title III of P.L. 93-638, as amended the Secretary shall provide to the Nation the total amount of funds specified in the Annual Funding Agreement incorporated by reference in Article V, Section 1. In accordance with Section 304 Title III of P.L. 93-638, as amended the use of any and all funds under this Compact shall be subject to specific directives or limitations as may be included in applicable appropriations acts.

Section 4—Payment. Payments shall be made as expeditiously as possible and should include financial arrangements to cover funding during periods under Continuing Resolutions to the extent permitted by such Resolution. For each fiscal year covered, the Secretary or his authorized representative will make available the funds specified for that fiscal year under the Annual Funding Agreement by paying to the Tribe on a quarterly basis one-quarter of the total amount

provided for in the Annual Funding Agreement for that fiscal year, or by using an instrument such as a letter of credit, or other method authorized by law, or a combination thereof, as may be specified in the Annual Funding Agreement. To the extent applicable, if payments are to be made on a quarterly basis, each quarterly payment should be made on the first working day of each quarter of the fiscal year except for the first quarter, for which the one-quarter payment shall be made on or therefore 10 calendar days of the date on which the Office of Management and Budget apportions the appropriations for that fiscal year for the services subject to the Compact.

Section 5—Reports to Congress. In order to implement Section 305 of Title III of P.L. 93-638, as amended on each January 1 and July 1, throughout the period of the Compact, the United States shall make a written report to the Congress which shall separately include the views of the Nation and describe the relative costs and benefits of carrying out this Compact, based upon mutually determined baseline measurements jointly developed by the parties pursuant to Section 17 of this Article.

Section 6—Audits. The Nation shall provide to the Secretary an annual single organization-wide-audit report as prescribed by the Single Audit Act of 1984, 31 U.S.C. 7501, *et. seq.*, and Circular A-128 of the Office of Management and Budget, which audit report shall adhere to standard accounting principles. The Secretary shall not require the Nation to satisfy any other audit or accounting standards for purposes of this Compact.

Section 7—Records. In addition to whatever provisions may apply under the Nation's law on document disclosure and govern record-keeping, the Nation shall maintain a record-keeping system and provide the Secretary reasonable access to records which permits the Department to meet its minimum legal record-keeping program requirements under

the Federal Records Act, 44 U.S.C. 3101, *et. seq.*, which will allow for retrocession of this Compact in whole or in part pursuant to Section 12 of this Article and satisfy all audit requirements under this Compact.

Section 8—Property. The following provisions supplement the Nation's law on property procurement and management and govern such activity associated with this Compact.

(a) Departmental Property. At the request of the Nation, the Secretary shall make available to the Nation reasonably divisible real property, facilities, equipment and personal property that the Department previously utilized to provide the services-now consolidated by the Nation pursuant to Article III of this Compact and Section 2 and 3 of the Annual Funding Agreement. A mutually agreed upon list specifying the property, facilities, and equipment shall also be prepared before the effective date of this Compact, and periodically revised thereafter.

(b) Excess Property. Subject to the agreement of the General services Administration, the Secretary hereby delegates to the Nation the authority to acquire and take title to such "excess" property as may be appropriate in the judgment of the Nation to support the services designated under Article II of this Compact and Section 2 and 3 of the Annual Funding Agreement. The Secretary agrees to make best efforts to assist the Nation in obtaining such confiscated or excess property as may become generally available to tribes or local governments. Subject to the agreement of the General Services Administration, a Screener Identification Card (General Services Administration Form 2946) shall be issued to the Nation no later than the effective date of this Compact. Upon request, the Secretary's Designated official shall assist the Nation in securing the use of this Card.

(c) Capital Equipment. The Nation shall determine what capital equipment, leases, rentals, property or services it shall require to perform its obligations under Article II of this Compact, and shall acquire and maintain records of such capital equipment, leases, rentals, property or services through tribal procurement procedures.

Section 9—Savings. Any funds not expended during the term of any of the compact fiscal years may be carried over and spent in the succeeding years and that carryover shall not diminish the amount of funds the Nation is authorized to receive in any succeeding compact year.

Section 10—Use of Motor Vehicles. Subject to the agreement of the General Services Administration, the Secretary hereby authorizes the Nation to obtain Interagency Motor Pool vehicles and related services, if available, for performance of any activities under this Compact.

Section 11—GSA Rates, Schedules and Agreements. Subject to the agreement of the General Services Administration, the Secretary hereby authorizes the Nation to obtain access to all Rates, Schedules, and Agreements, if available, for performance of any activities under this Compact.

Section 12—Disputes.

(a) Obligations of the United States under this Compact shall be deemed the same as "duties" under Section 110 of the Indian Self-Determination and Education Assistance Act Amendments of 1988, Title III of P.L. 93-638.

(b) In addition or as an alternative to remedies and procedures prescribed by Section 110 of the Indian Self-Determination and Education Assistance Act Amendments of 1988, Title III of P.L. 93-638, the parties may jointly submit disputes under this Compact to non-binding third-party mediation, which mediator is chosen

by the Nation and the Secretary nominating third-parties who together choose a third-party mediator ("third-party" here means a person not employed by or significantly involved with either the Nation or the United States).

Section 13—Retroceding this Compact. Any retrocession under this Compact shall be governed by the provisions of Section 105(e) of the Indian Self-Determination and Education Assistance Act Amendments of 1988, Title III of P.L. 93-638.

Section 14—Tribal Administrative Procedures. Tribal law and tribal forums shall provide administrative due process rights pursuant to the Indian Civil Rights Act of 1968, 25 U.S.C. 1301, *et. seq.*, that persons, or groups of persons may have with respect to services that are provided by the Nation pursuant to this Compact.

Section 15—Successor Annual Funding Agreement. Negotiations for a successor Annual Funding Agreement as provided for in Article V, Section 1, shall begin no later than 120 days in advance of the conclusion of the preceding Annual Funding Agreement. Pursuant to Section 301 and Section 303(a) Title III of P.L. 93-638, the Secretary shall make best efforts to continue and to promote this demonstration project in preparing his budgets for subsequent years. The Nation is hereby assured that future funding of successor Annual Funding Agreements may be reduced only pursuant to the provisions of Section 106(b) of the Indian Self-Determination and Education Assistance Act Amendments of 1988, Title III of P.L. 93-638. The Secretary agrees to prepare and supply relevant information, and promptly to comply with the Nation's requests for information reasonably needed to determine the funds that may be available for a successor Annual Funding Agreement as provided for in Article V, Section 1 of this Compact.

Section 16—Regulatory Authority. The Secretary and the Nation agree to utilize the following procedures governing the establishment and application of standards and regulations under this Compact:

(a) Program Standards. The Nation agrees to abide by existing federal standards, where such standards exist, in carrying out the services under the Compact. The Nation may adopt its own standards to be used in place of the existing federal standards.

(b) Federal Regulations. In accordance with Section 303(e) Title III of P.L. 93-638, as amended the Secretary will seek to expedite the waiver of federal regulations which the Secretary or the Nation determine presents an obstacle to the carrying out of the Compact, its purposes, and the services pursuant to the Compact, under the following procedures:

(i) prior to the effective date of the Compact, the Secretary and the Nation will seek to identify any federal regulations that may require waiver in order to effectively carry out the Compact;

(ii) if at any time the Nation determines that one or more specific federal regulations requires waiver to effectively carry out the Compact, the Nation may submit its written request for waiver to the Secretary concerning those regulations over which the Secretary has authority, and the Secretary shall render a written decision to the Nation within 30 working days of the date of the Secretary's receipt of the Nation's request.

Section 17—Establishment of Baseline Measures. In accordance with Title III, Section 305 of P.L. 93-638, as amended, the Secretary and the Nation will jointly develop baseline measures within 60 days of signature of this compact which shall be submitted as Attachment 3.

Section 18—Inspector General Authority. Nothing in this Compact shall limit the authority of the Inspector General in carrying out his statutory duties and responsibilities.

Section 19—Designated officials. On or before the effective date of this Compact, both the United States and the Nation shall provide each other with a written designation of a senior official as its representative/liaison official for notices, proposed amendments to the Compact and other purposes arising under this Compact.

Section 20—Indian Preference in Employment, Contracting and Subcontracting. Tribal law shall govern the provision of Indian preference in employment, contracting, and subcontracting pursuant to this Compact. Section 104 Title III of P.L. 93-638, as amended shall apply to individuals who leave federal employment for tribal employment.

Section 21—Insurance. The Nation shall be fully covered by such liability insurance or equivalent coverage that the Secretary provides or obtains pursuant to Section 102(c) of the Indian Self Determination and Education Assistance Act Amendments of 1988, Title III of P.L. 93-638.

Section 22—Compact Modifications. Subject to applicable laws, modifications to this compact shall be in the form of a written amendment to the compact, and shall require the written consent of the Nation and the United States.

Section 23—Construction. In the implementation of this Compact, the Secretary, to the extent feasible, shall interpret Federal Laws and Regulations in a manner that facilitates this Compact in accordance with Section 303(e) Title III of P.L. 93-638.

Section 24—Officials Not to Benefit. No member of or delegate to Congress, or appropriate agency official, shall be admitted to any share or part of any contract executed pursuant to this Compact, or to any benefit that may arise

therefrom; but this provision shall not be construed to extend any contract under this Compact if made with a corporation far its general benefit.

Section 25—Covenant Against Contingent Fees. The parties warrant that no, person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this Compact upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor far the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul any contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

Section 26—Penalties. The parties agree that the criminal penalties set forth in 25 U.S.C. 450d apply to all activities conducted pursuant to this Compact.

Article V—Attachments

Section 1—Annual Funding Agreement. The first Annual Funding Agreement incorporating those services to be performed, within the General Budget Category assigned, the funds to be provided, and the budget year to which it applies, is hereby incorporated in its entirety in this Compact and attached hereto as Attachment 1. Each Successor Annual Funding Agreement shall be likewise incorporated, attached, and identified as Attachment 1 for the relevant budget year to which it applies.

Section 2—Authorization of Compact. This Compact is authorized to be executed by the Principal Chief of the Cherokee Nation pursuant to the authority of the Constitution

and by Resolution, dated February 13, 1993, of the Council of the Cherokee Nation authorizing the submission of this compact and hereto submitted as Attachment 2.

Section 3—Baseline Measures. Baseline Measures will be negotiated within 60 days of signature of this compact and will be incorporated into this compact as Attachment 3.

Section 4—Inconsistent Terms. To the extent that any attachment is inconsistent with the terms of this Compact, the Compact shall govern.

DATED THIS 30th DAY OF JUNE, 1993.

CHEROKEE NATION

By /s/ Wilma P. Mankiller
WILMA P. MANKILLER, Principal Chief
Cherokee Nation

UNITED STATES OF AMERICA

By /s/ Michael E. Lincoln
MICHAEL E. LINCOLN
Director Indian Health Service
Department of Health and Human Services

FISCAL YEAR 1997
ANNUAL FUNDING AGREEMENT
BETWEEN
THE UNITED STATES OF AMERICA
AND
CHEROKEE NATION

SECTION ONE
PREAMBLE

This Annual Funding Agreement (AFA) is executed and entered into by and between the Cherokee Nation (the Nation) and the United States of America pursuant to the Indian Self-Determination and Education Assistance Act P.L. 936-38, as amended. This AFA is incorporated into and govened by the Compact of Self Governance entered into between the Nation and the Secretary of the Department of Health and Human Services on October 1, 1993.

SECTION TWO
GENERAL BUDGET CATEGORIES

The Nation is authorized to plan, conduct, consolidate, administer, and, subject to the terms of the Compact, redesign the following programs, activities and services, and to reallocate and expend the funding identified within the following General Budget Categories as a consolidated Tribal Government budget:

1. Clinical Services:	1997 Totals
Hospital & Health Clinics	$ 9,171,670.00
Dental Services	1,581,207.00
Mental Health	1,254,800.00
Alcohol & Substance Abuse	630,085.00
Total Clinical Services (l), (2), (3), (4)	$12,637,762.00
2. Contract Health Services (l), (2), (5), (6), (7), (8)	2,000,602.00

3. Preventive Health Services:

Public Health Nursing	$ 876,993.00
Health Education	163,300.00
Community Health Representatives	1,511,070.00
Total Preventive Health Services (1), (2), (3), (4)	$ 2,551,363.00
4. Direct Contract Support Costs (1), (2), (9)	$ 473,077.00
TOTAL STANDARD INDIAN HEALTH SERVICE PROGRAMS	$17,662,804.00

SECTION THREE
FORMULA DRIVEN FUNDING

The following services, programs or activities shall be funded as "Formula Driven" funding:

HEADQUARTERS SHARE:

OEHE (10)	$297,600.00
Equipment Replacement Requirement	139,384.00
Facility Support	30,020.00
Unmet Need (11)	
Sub-Total	$467,004.00

AREA SHARE:

OEHE Service Unit Direct	$551,495.00
OEHE OCAO Tribal Share	184,498.00
Facilities Support	14,897.00
Maintenance & Improvement (M&I) 12	70,223.00
Sub-Total	$821,113.00

HOSPITALS & CLINICS:
Continuing Medical Education
Nursing Continuing Education
Special Pay
Change of Station
Model Diabetes
DENTAL:
Equipment Replacement

Special Pay
Change of Station
Continuing Education
Training
MENTAL HEALTH:
Change of Station
Special Pay

	Funding to be determined
Sub-Total (13)	$
	Funding to be determined
Share of Fiscal Intermediary (Contract Health) (14)	
Sub-Totals	$
TOTAL SECTION III FUNDING	$1,288,117.00

SECTION FOUR
CONGRESSIONALLY—EARMARKED FUNDING

Funding for the following programs, activities or services shall be furnished to the Nation and expended in accordance with the specific purposes expressly stated in federal legislation:

Sanitation Facilities Construction (15)	$_____
Total Congressional Earmarked Funding (15)	$_____

SECTION FIVE
TRIBAL SHARE OF OKLAHOMA CITY AREA AND HEADQUARTERS OFFICES

Subject to the provision of Section Twelve of this AFA, the United States shall make available to the Nation its "tribal shares" of the IHS Oklahoma City Area Office (OCAO) and the IHS Central Headquarters budgets in the amounts identified in this Section below. The Nation is authorized to expend, reallocate, shift or transfer any or all of such funding and administer same as a consolidated tribal government budget. The funding identified below as the Nation's tribal share of the OCAO and Headquarters budgets represents a

compromise between the Nation and the United States in light of conflicting views as to the amounts to be made available for tribal share allocation, the percentages of the Nation's share compacted, and the formulas used to allocate tribal share funding among the tribes. By accepting such funding, the Nation is not agreeing that it is an accurate allocation of its true tribal share of the OCAO or Headquarters budgets. The parties hereby agree to review the OCAO and Headquarters determination of their respective residual resources. The parties further agree that some resources identified as residual, or otherwise unavailable for tribal share distribution, may become available for such distribution prior to and/or during Fiscal Year 1997 (FY-97), in which case the Nation's share of such additional funding shall be identified in an addendum hereto and made available to the Nation.

Central Headquarters Tribal Share (5), (16), (17)	$1,692,901.00
Area Office Tribal Share (5), (16), (17)	919,264.00
TOTAL OCAO AND HEADQUARTERS TRIBAL SHARE	$2,612,165.00

SECTION SIX
INDIRECT COST FUNDING

The minimum amount of funds allocated to the nation under this AFA for Indirect Cost Funding shall be established and paid as follows:

Indirect Cost All Program Funds (18)	$1,441,254.00
TOTAL INDIRECT COST FUNDING	$1,441,254.00

SECTION SEVEN
SUMMARY OF FUNDING

The funding made available to the Nation under this AFA is summarized as follows:

Standard IHS Programs	$17,662,804.00
Section III Funding	$1,288,177.00

Congressionally Earmarked Funding	
Tribal Shares—OCAO and Central HQ Offices	2,612,165.00
Indirect Cost Funding (18)	1,441,254.00
TOTAL FY-97 FUNDING (19) (20) & (21)	$23,004,400.00

SECTION EIGHT
SERVICES NOT COVERED BY THIS AGREEMENT

The following services are not included within this Annual Funding Agreement:

Claremore Service Unit—Inpatient Medical Services in Claremore and associated Direct and Contract Health Services; outpatient clinics located in Claremore; and the administrative support for all such services at the OCAO and Headquarters administrative levels.

Tahlequah Service Unit—Inpatient Medical Services in Tahlequah and associated Direct Services, out-patient clinics located in Tahlequah, and the administrative support for all such services at the OCAO and Headquarters administrative levels.

Buy-Indian Contract for Regional Adolescent Treatment Center—The terms of the Jack Brown Treatment Center contract shall govern the program services and activities.

The Nation reserves the right to include such services and the funding therefore in this AFA, by way of amendment, or in future AFA negotiations.

SECTION NINE
ITEMS OF DISPUTE

Any items or issues remaining in dispute under this AFA as of the execution date hereof shall be identified on an attachment to this AFA labeled "Items or Issues in Dispute." The disputed items/issues shall be transmitted to the Secretary immediately. The parties may brief the issues if they choose, but in any event a decision shall be made by the Secretary in

writing in a timely fashion to avoid disruption of services. If the decision pertaining to a disputed item or issue grants the specific relief requested by the Nation, the funding shall be modified into this AFA by way of the Secretary's written decision which shall become a part of the AFA. If a disputed item or issue is settled between the parties, the resolution shall be set forth in an addendum to this AFA.

SECTION TEN
ADJUSTMENTS DUE TO CONGRESSIONAL ACTIONS

The parties agree that adjustments may be appropriate due to unanticipated Congressional action. Upon enactment of relevant Appropriations Acts, the adjustments may be negotiated as necessary; provided, however, the Nation shall be notified and consulted in advance of any proposed adjustments. It is recognized by the parties that circumstances may arise where funding variances or other changes or modifications may be needed, and the parties shall negotiate same in good faith. Provided, however, this AFA shall not be modified to decrease or delay any funding except pursuant to mutual agreement of the parties.

SECTION ELEVEN
PREVIOUS P.L. 93-638, SECTION 102, CONTRACTS/GRANTS FUNDS

Any contract funds heretofore made available to the Nation under 25 U.S.C. § 450f which remain unexpended as of the effective date hereof shall be expended in accordance with the appropriate provisions of this AFA. Any such funds, and the corresponding services or activities, shall not be subject to the provisions of said contracts or grants except as provided herein or in any amendment hereto.

SECTION TWELVE
PAYMENT

The parties agree that IHS will request apportionment of 100% of total FY-97 AFA funding in the first quarter. Upon

receipt of apportioned funds the IHS will within 30 days process and make available to the Cherokee Nation 100% of the direct and 90% of the HQ's and Area Tribal Share. Within 90 days of apportionment the IHS will make available the remaining 10% of HQ's and Area Tribal Shares. The Nation shall not be held accountable for interest earned on such funds, pending their disbursement by the Nation.

SECTION THIRTEEN
BASELINE MEASURES

In accordance with the Nation's Self-Governance Compact, the Nation agrees to submit semi-annual and annual Self-Governance Baseline Measures reports to the Secretary. The Nation and IHS are presently jointly involved in the development of the format for the FY-97 Baseline Report and agree that when finalized the baseline measures for FY-97 will be included as an addendum to the FY-97 AFA.

SECTION FOURTEEN
EFFECTIVE DATE

This AFA shall be effective on October 1, 1996, and this AFA, and any amendments hereto, shall remain in effect through September 30, 1997.

SECTION FIFTEEN
OTHER PROVISIONS

1. The Nation shall have the right to participate in the development of "Budget Enhancements" for inclusion into the Indian Health Service's proposed budget.

2. The OCAO shall provide the Nation with copies of all of the Area's advice of allowance documents that pertain to the Nation and OCAO/HQ's funds when they are processed in the Area Office.

3. The OCAO shall provide to the Nation the opportunity to share in year-end resources received by the OCAO or are

distributed by the Headquarters. Resources referred to herein are those that were not otherwise available for Tribal Shares distribution from the Oklahoma Area Office Residual or Retained Tribal Shares or from Headquarters. The IHS shall provide the Nation with a financial report reflecting the distribution and method used.

4. The Nation has requested that title to all government personal property identified in a physical inventory conducted by OCAO Property Management personnel, and currently utilized in conjunction with the Cherokee Nation's compact with IHS be transferred to the Nation.

5. The Nation shall be notified of and authorized to participate in property screenings associated with "Project Transam" by IHS Headquarters. Pursuant to the aforementioned, IHS shall notify the Nation of scheduled lotteries to be conducted relevant to "Project Transam" whereby the Nation is authorized to observe and/or participate in such process.

6. The IHS shall make available to the Nation on September 1, 1997, its share of the balance of both the Emergency and the Management Initiative Fund by way of an Addendum during FY-97.

7. The Nation will utilize the Federal Provider number at the W.W. Hastings Indian Hospital and transmit claims to the State of Oklahoma Medicaid program and Blue Cross and Blue Shield of Texas for Medicare. This process will remain in effect until such time as the Nation is allowed to receive payments directly from the aforementioned fiscal intermediaries. The OCAO will provide the Nation copies of EOB's pertinent to the Nation's Medicaid and Medicare collections and monthly third-party cash collection reports.

8. In the event of damage or destruction caused by an "Act of God" to any health facilities funded by the IHS and operated by the Nation, the IHS shall provide same treatment as is provided IHS operated facilities under similar circumstances.

9. IHS will provide sufficient documentation to facilitate the Nation's reconciliation of the AFA funding agreement to the cash actually received on a quarterly basis.

10. The Indian Health Service will be responsible for all costs associated with severance pay relative to all Special Purpose IPA and MOA staff separations occurring as a result of the Nation's compacting IHS programs and services. Resources required to fund these costs in no way will reduce the negotiated AFA amount or tribal shares.

11. As authorized by P.L. 104-109, the Cherokee Nation hereby exercises its option to include the following provisions of Title I of the ISDA as part of this AFA, and shall have the same force and effect as if set out in full in Title III of this title and shall supersede any inconsistent provisions set forth in the Compact entered into between the Nation and HHS on June 30, 1993:

a) All of U.S.C. sec. 450i, entitled Retention of Federal employee coverage, rights and benefits by employees of tribal organizations, except omitted subsections (a) to (d), (k) and (1)

b) All of § 450f(c), entitled "Liability insurance; waiver of defense"

c) All of § 450f(d), entitled "Procurement of liability insurance by tribe as prerequisite to exercise of contracting authority by Secretary; required policy provisions"

d) All of 25 U.S.C. § 450j(e), entitled "Effective date for retrocession of contract"

e) All of § 450j(f), entitled "Use of existing school buildings, hospitals, and other facilities and equipment therein, acquisition and donation of excess or surplus Government personal property

f) All of 25 U.S.C. § 450j(k), entitled "Access to federal sources of supply"

g) All of 25 U.S.C. § 450j(l), entitled "Lease of facility used for administration and delivery of services"

h) All of 25 U.S.C. § 450j-l, entitled "Contract funding and indirect costs"

i) All of 25 U.S.C. § 450l(b) and all provisions of Section 1(b)(7) of Model Agreement contained in 25 U.S.C. § 450lc regarding federal records

j) All provisions of Section 1(b)(10) of Model Agreement, entitled "Transportation," and contained in 25 U.S.C. §450lc

k) All provisions of Section 1(b)(11) of Model Agreement, entitled "Federal program guidelines, manuals, or policy directives

l) All provisions of Section 1(b)(15) of Model Agreement entitled "Contract requirements; approval by Secretary," and contained in 25 U.S.C. § 4501c

m) All provisions of § 450m, entitled "Rescission of contract or grant and assumption of control of program, etc; authority; grounds; procedure; correction of violation as prerequisite to new contract or grant agreement; construction with occupational safety and health requirements"

n) All provisions of § 450m-l, entitled "Contract disputes and claims"

o) All provisions of §450n, entitled "Sovereign immunity and trusteeship rights unaffected"

SECTION SIXTEEN
ENDNOTES

1. Fiscal Year 97 funding increases for mandatories and for contract support, and funding for third-party collections are not included in this AFA, due to the lack of required information. Such funding shall be adjusted and modified into

this AFA when the actual FY 1997 appropriations become available, and the Nation's full share of such funding shall be paid. Funding hereunder shall also be increased by way of amendment(s) to this AFA whenever authorized by future congressional action. The parties agree that any such funding which may be identified and made available for distribution to the Nation shall be transferred to the Nation without formal execution of an addendum or other modification document. The Nation shall be notified in advance of such transfer of funds and informed of the source and/or purpose of such funding.

2. Any FY-97 non-recurring funds not included in this AFA, shall be included herein when actual FY-97 appropriations become available.

3. After IHS has addressed the internal issues regarding the MOA/IPA Pilot Project and is prepared to implement it for all tribes in 1997, the Nation will be allowed to participate in said project.

4. The Nation's allocation of the Regional Supply Services Center (RSSC) resources are estimated to be $2,000,000 (subject to monthly reconciliation and adjustment). The parties agree that unless otherwise provided herein, these resources shall remain with OCAO, and the Nation shall issue monthly written notice to the Office of Self-Governance authorizing transfer of said funding to the RSSC after the Nation has completed the appropriate receiving reports for internal control; provided that the parties shall negotiate a Memorandum of Understanding setting forth more detailed guidelines for this payment procedure prior to October 1, 1996. It is understood that the Cherokee Nation shall seek the Secretary's or designee's approval of written procedures for the Nation's direct purchase of drugs and supplies from the IHS at the RSSC utilizing the Nation's allocation of RSSC resources; and the parties agree that if such approval is granted, the balance of the Nation's RSSC resource allocation

shall be transferred to the Nation, and RSSC shall invoice the Nation monthly for purchases of drugs and supplies. The Nation further reserves the right to negotiate a future addendum to the AFA to provide for a transfer of some or all of such resources for purchasing drugs and supplies from third-party suppliers. The IHS and the Nation agree to negotiate a new sur-charge rate applicable for Ada warehouse services prior to October 1, 1996.

5. The funding presently identified for Contract Health Services pertains to out-patient medical and/or dental associated with the Nation's five (5) health clinics. During final FY-97 negotiations on June 6th, the Nation notified the IHS of its intent to compact Contract Health Services for in-patient, out-patient and dental associated with the Tahlequah Service Unit (W.W. Hastings Facility) effective October 1, 1996, for FY-97. The Nation has requested information pertinent to finalizing the funding amounts associated with this CHS compacting process. (See June 10, 1996 letter to Randy Grinnell, Acting Area Director, OCAO from Dr. David Kingfisher, identified as "Attachment B" and expressly incorporated by reference in this AFA.) IHS shall respond to said request and shall make a determination of funding levels for said CHS services, as soon as possible, to ensure that the parties have sufficient time to negotiate and approve an Addendum to this AFA setting forth funding amounts and applicable footnotes prior to September 15, 1996.

6. The OCAO Indian Health Service shall process and pay if approved, for the following Contract Health Services referred and authorized by the Tahlequah Service Unit (W.W. Hastings Hospital), utilizing its FY-96 or prior fiscal year resources with an estimate completion date of December 31, 1998: (1) All non-emergency Contract Health Service authorizations for in-patient and out-patient services dated prior to October 1, 1996; (2) all emergency in-patient and out-patient services rendered prior to October 1, 1996, provided that IHS authorized payment within seventy-two hours of

provision of said services; and (3) all authorized in-patient and out-patient services, regardless of date of service, when such services were provided as a result of referrals arising from a diagnosis made during the course of emergency room treatment or in-patient admission occurring prior to October 1, 1996. OCAO payment for said above-described services shall in no way reduce the Cherokee Nation's negotiated AFA amount for FY-97.

7. All requests and documentation for Contract Health Service Catastrophic and Deferred Services resources will be sent directly to OCAO for processing and submission to IHS Headquarters East for funding determination and amendment of Funding Agreement.

Consistent with CHS eligibility regulations the following persons shall be eligible to receive the Nation's Contract Health Services funded under this AFA: 1) Cherokee Tribal Users residing within the Tahlequah Service Unit 2) All persons currently eligible for CHS under the Nation's five health clinics 3) non-indigenous users residing with the agreed upon Cherokee jurisdictional boundaries within the Tahlequah Service Unit.

9. The Nation maintains that for fiscal years 1992-1995, the Nation has not received all direct contract support funding, due the Nation, in accordance with effective dates that the new funding was authorized, relative to new and expanded programs.

10. For the Cherokee Nations allocation of OEHE Support Headquarters' funds the parties agree to continue the transition from a user population formula to the workload formula, as negotiated in the FY-96 AFA. The Nation's FY-97 allocation of funds is an amount equal to 80% of the FY-96 funding. The allocation for each succeeding fiscal year thereafter through FY-99 shall be 80% of the previous fiscal year's funding, provided, that if the workload formula or other formula approved by the Director would yield a larger allocation

for any of the fiscal years during the transition period, the larger allocation would apply for any such year. Accordingly, the estimated allocations for FY's-97 through 1999 are $297,600, $238,000, and $190,400, respectively, unless for any such fiscal year the workload or other approved formula would yield a greater sum. After FY-99, the workload or other formula approved by the Director shall be used to determine the Cherokee Nation's allocation. The $297,600 is comprised of $33,254 of program formula for Sanitation Facilities Construction Support and Environmental Health Services Support: and $264,346 of IHS Seif-Governance funds. The funding described herein represents a negotiated settlement; the Nation does not concede that the workload formula is an appropriate method of allocating these funds.

11. The Unmet Needs funding has not been determined and will be included FY-97 in accordance with the Unmet Needs program formula. Said adjustments shall be made by way of an addendum executed by the parties.

12. In addition to the funds identified in this line item, the Nation shall be entitled to participation in any Special Projects funding during FY-97.

13. This funding shall be determined on a recurring base established by FY-96 allocations, pending resolution of any disputes regarding the method used to calculate the FY-96 allocations. By identifying and accepting this funding as "Program Formula," the Nation shall not be conceding that the formula used to establish the FY-96 base allocation was appropriate or consistent with legal requirements, or that such funding should not be allocated as tribal shares.

14. The Nation's share of Fiscal Intermediary funding pertinent to FY-97 Contract Health Services funding will be added to this AFA in accordance with Endnote (5) accordance with the provisions of said letter agreement and the attached project scope documents. Said letter agreement shall be signed by the Nation's Principal Chief and the IHS

Official designated by the Director of IHS. The total amount of the project money identified in the letter agreements shall be added to this section of the AFA and shall be made available to the Cherokee Nation within 60 days after the IHS Area Office receives the completed project documents.

16. The amounts included in the AFA for the Nation's OCAO and Headquarters tribal shares and for Sanitation Facilities Support reflect a negotiated, compromised amount and the parties do not necessarily accept each other's methodologies used in arriving at the amounts to be provided by the Secretary hereunder. Specifically the Nation disagrees with the decision of the IHS to utilize a "Tribal Size Adjustment" formula instead of historically applied User Population formula for resource allocation. Further, the parties agree to review OCAO and Headquarters residual resources and understand that, should the residual amount be decreased, this AFA shall be modified to include the Nation's share of additional funding made available by the decrease in residual.

17. The Nation agrees to not compact its share of OCAO RPMS budget line item under the FY-97 AFA. Presently this amount has been identified at $77,820. The Nation and OCAO have met and concluded this funding will remain with the OCAO in exchange for continued information technology support in accordance with Attachment "A". With respect to IHS Headquarters, the Nation shall receive its allocation of IHS Headquarters RPMS equipment fund, OIRM Headquarters East and OIRM Headquarters West funding in accordance with Section 12 hereof; provided, however, the parties agree that the Nation and United States may amend this AFA at a later date to provide identified products and services agreed upon with the Office of Information Resources Management and the Office of Health Program Research and Development.

18. While accepting this amount, the Cherokee Nation is not agreeing this is the total entitlement of the Tribe. The

Nation claims that it is entitled to an additional $2,240,109 for indirect cost (estimate based on the current negotiated IDC rate of 17.1%) based upon the Indirect cost rate negotiated with the Department of Interior, Office of Inspector General and the operation of that government direct program and rules. By accepting this amount, the Nation is not waiving any claim it may have to additional indirect cost funding. By signing this agreement, the IHS position is that it is not agreeing to the Nation's assertion that it is entitled to an additional amount of $2,240,109 for indirect cost.

19. Non-recurring resources to include, but not limited to the following sources will be added to the funding with an amendment to the AFA upon identification for the Nation: Deferred Service Funds and Quality Assurance Funds.

20. Any additional recurring dollars identified during FY-96 will be added to the FY-97 AFA as an addition to the Recurring Program Base Budget Funds when the IHS releases the figures.

21. See endnotes applicable to each of the funding categories identified in this Section.

20. Any additional recurring dollars identified during FY-96 will be added to the FY-97 AFA as an addition to the Recurring Program Base Budget Funds when the IHS releases the figures.

21. See endnotes applicable to each of the funding categories identified in this Section.

Dated this 24th day of July 1996.

CHEROKEE NATION	UNITED STATES OF AMERICA
By: /s/ Joe Byrd	By: /s/ Dr. Michael Trujillo
JOE BYRD	MICHAEL TRUJILLO
Principal Chief	Director of Indian Health Service
	Department of Health and Human Services

[See JA Vol. II, PART 1 for Attachments]

CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465-0948
918-456-0671

September 26, 1997

VIA FEDERAL EXPRESS
AND CERTIFIED U.S. MAIL

Dr. Michael H. Trujillo, Director
Indian Health Service
Department of Health and Human Services
5600 Fishers Lane, Room 6A-05
Rockville, Maryland 20857

Re: Enclosed Contract Disputes Act
Claim for Fiscal Year 1997 Indirect Costs

Dear Dr. Trujillo:

The Cherokee Nation hereby claims the right to immediate payment of amounts immediately due and owing to the Nation under the provisions of the Nation's 1997 Annual Funding Agreement for its Compact of Self Governance with the United States and Sec. 303(a)(6) of Title III of the Indian Self-Determination and Education Assistance Act (ISDA). This claim is submitted pursuant to the provisions of the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* §§ 110(d) and 403(h) the ISDA as amended.

The amount due Cherokee Nation is TWO MILLION, SEVEN HUNDRED EIGHTY-FIVE THOUSAND, NINE HUNDRED FORTY-EIGHT DOLLARS ($2,785,948) for FY 1997 Indirect Costs. Under §303(a)(6) of Title III of the ISDA, the Nation's 1997 Annual Funding Agreement must provide the Nation funding "in the amount equal to that

which the tribe would have been eligible to receive under contracts and grants under this Act, including direct program costs and indirect costs. . ." Pursuant to that provision of the Act, and as noted in Section Sixteen, number 18 of the Nation's 1997 Annual Funding Agreement, the Nation hereby claims a contractual and statutory right to receive indirect costs based upon the Nation's 1997 indirect cost rate negotiated with the Department of Interior, Office of the Inspector General.

The Cherokee Nation understands that the Office of the Inspector General has placed a moratorium on negotiating indirect cost rates pending further proceedings in Ramah Navajo Chapter v. Lujan, now pending (on remand from the Eighth Circuit Court of Appeals) in the United States District Court of the District of New Mexico (Civ. No. 90-957 LH/W WD). This claim is therefore based upon the Nation's 1997 proposed indirect cost rate of 14.93%. The Nation reserves its right to amend this claim upon conclusion of negotiations with the Office of the Inspector General. The claim is without prejudice to any additional indirect costs that may be due to the Nation under any revised indirect cost methodology that may be adopted pursuant to any rulings, judgement, or settlement in Ramah Navajo Chapter v. Lujan.

The Nation's claim fully credits the United States for the indirect costs amounts actually paid to the Nation for Fiscal Year 1997.

In support of this claim I enclose the following documents:

(1) a worksheet prepared by the Nation showing (a) the indirect costs that were due under the Nation's 1997 Annual Funding Agreement and §303(a)(6) of the ISDA, (b) the amounts actually paid by the United States, and © [sic] the balance owed (Exhibit 1);

(2) the Nation's 1997 Annual Funding Agreement (Exhibit 2);

(3) the Nation's Fiscal Year 1997 Indirect Cost Proposal (Exhibit 3); and

(4) Copies of Payment Management System (PMS) fund transfer documents showing the indirect cost amounts actually paid to the Nation by the United States for Fiscal Year 1997.

Please recall that, under the terms of the Prompt Payment Act, 31 U.S.C. § 3901 et. Seq. and the Contract Disputes Act, 41 U.S.C. § 611, interest is accruing on the amount due.

We would appreciate you prompt decision on this claim.

Sincerely,

/s/ Joe Byrd
JOE BYRD
Principal Chief

cc: Paula Williams, Director, Office of Tribal Self Governance Lloyd Miller, Esq.

CERTIFICATION
OF CONTRACT DISPUTES ACT CLAIM

I, Joe Byrd, Principal chief of the Cherokee Nation, hereby certify as follows on behalf of the Nation:

(1) the above claim is made in good faith;

(2) the supporting data are accurate and complete to the best of my knowledge and belief;

(3) the amount requested accurately reflects the adjustment for which the Nation believes the government is liable; and

(4) I have been duly authorized to certify this claim on behalf of the Cherokee Nation.

DATED this 29th day of September 1997.

CHEROKEE NATION

By: /s/ Joe Byrd
JOE BYRD, Principal Chief

CERTIFICATE OF DELIVERY

I, Melinda Brown, swear or affirm under penalty of perjury:

1. I am an employee of the Cherokee Nation.

2. I sent the originals of this document, together with the referenced Exhibits 1 through 4, via Federal Express and certified U.S. mail to:

   Dr. Michael H. Trujillo, Director
   Indian Health Service
   Department of Health and Human Services
   5600 Fishers Lane, Room 6A-05
   Rockville, Maryland 20857

on the 29th day of September, 1997.

3. On the same date I also sent copies of the same documents, via Federal Express and certified U.S. Mail, to:

   Paula Williams, Director
   Office of Tribal Self Governance
   Indian Health Service
   5600 Fishers Lane, Room 6A-05
   Rockville, Maryland 20857

Dated this 29th day of September 1997.

DRAFT
For Discussion Purposes Only

Procedures for Allocating Prior Year Unobligated Balances to Satisfy CSC Shortfalls

I. Introduction

Each year the IHS has balances at the end of the fiscal year that remain either unobligated or are obligated but still unliquidated. These funds are tracked by sub-sub-activity and remain available for obligation by sub-sub-activity in the event that a "bonafide obligation" is presented to the IHS that requires payment. Any crossing of obligations by sub-sub-activity requires reprogramming. The balances are available for 5 years after which time they are no longer available and must be transferred to the Treasury. For example, on October 1, 1997 any balances that remained unliquidated from FY '92 were transferred to the Treasury. Balances from FY's 1993,1994,1995,1996, and 1997 would remain with IHS for obligation and liquidation.

This section provides guidance to the IHS Division of Financial Management (DFM) in obligating prior year unobligated balances to cover bonafide CSC obligations from prior years.

II. Process

a. On or before November 10 of each year, the DFM shall identify in a report the current balances in each of the five prior fiscal years by sub-sub-activity as either obligated or unobligated. Unobligated balances shall not include such things as "x-account" funds, undelivered orders, third party collections and revenue, and the reserve for workers compensation claims.

b. Reprogramming Prior Fiscal Year Balances—

1. For the fifth prior fiscal year, the DFM shall submit a reprogramming request, if necessary, to move all balances, either obligated or unobligated, into the unobligated CSC sub-sub-activity.

2. For the third and fourth prior fiscal years, the DFM shall submit a reprogramming request, if necessary, to move all unobligated balances from any sub-sub-activity, into the unobligated CSC sub-sub-activity.

3. For the first and second fiscal years, only those unobligated balances under the Contract Support Cost sub-sub-activity will be available for obligation to cover bonafide CSC obligations from prior years.

c. Each area office shall work with T/TO's in their Area to document and certify any bonafide obligations for CSC [need a definition of this] that may exist in each of the past five fiscal years.

d. On or about March 30th of each fiscal year, the DFM shall identify the [percentage of ???] documented CSC needs for each T/TO by fiscal year from item "c" above and shall attempt to fund the same level of need for each T/TO's bonafide obligation from the unobligated balance available in the CSC sub-sub-activity. (*See* items b, 1, 2, & 3 above)

e. All funding of CSC from prior year unobligated balances shall be on a one-time non-recurring basis and shall not form the basis for subsequent funding of the same costs on a recurring basis.

ATTACHMENT

OPTION 2 DRAFT Continued

Instead of using prior year unobligated balances to fund the shortfalls in existing contracts, we may wish to concentrate on funding the startup and CSC needs of T/TO's in the ISD Queue as follows:

II. Process

a. On or before November 10 of each year, the DFM shall identify in a report the current balances in each of the five prior fiscal years by sub-sub-activity as either obligated or unobligated. Unobligated balances shall not include such things as "x-account" funds, undelivered orders, third party collections and revenue, and the reserve for workers compensation claims.

b. Reprogramming Prior Fiscal Year Balances

1. For the fifth prior fiscal year, the DFM shall submit a reprogramming request, if necessary, to move all balances, either obligated or unobligated, into the unencumbered CSC sub-sub-activity.

2. For the third and fourth prior fiscal years the DFM shall submit a reprogramming request, if necessary, to move all unobligated balances from any sub-sub-activity, into the unobligated CSC sub-sub-activity.

3. For the first and second fiscal years, only those unobligated balances under the Contract Support Cost sub-sub-activity will be available for obligation to cover bonafide CSC obligations from prior years.

c. The DFM shall identify the amounts required to fully fund the Start-up Costs of each T/TO listed in the ISD Queue. These amounts shall be documented and certified as a bonafide obligation for CSC [need a definition of this] for the fiscal year in which the T/TO assumed operation of the program.

d. On or about March 30th of each fiscal year, the DFM shall identify the documented Start up needs for each T/TO by fiscal year from item "c" above. The DFM shall attempt to fund the need for each T/TO's bonafide obligation for Start-up costs in the order in which they appear in the ISD Queue from the unobligated balance available in the CSC sub-sub-activity for the corresponding fiscal year. (*See* items b, 1, 2, & 3 above)

e. All funding of CSC from prior year unobligated balances shall be on a one-time non-recurring basis and shall not form the basis for subsequent funding of the same cost on a recurring basis.

[SEAL] Office of the Secretary

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the General Counsel
Rockville, Maryland 20857

March 25, 1999

To: Director, Indian Health Service

From: Chief, IHS Branch OGC

Subject: Payment of Start-Up Costs for Self-Determination Contracts and Self-Governance Compacts Entered Into in Fiscal Years 1994-1998.

It has come to my attention that the planned distribution of the $35 Million in new funds for fiscal year 1999 for contract support costs (CSC) appropriated by the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, H.R. 4328 (Oct. 21 1998) includes payment of start-up costs for past year's contracts and compacts. Section 314 of the above cited Omnibus Appropriations Act for 1999 states in full:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138,103-332,104-134,104-208 and 105-83 for payments to tribes and tribal organization for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, except that, for the Bureau of Indian Affairs, tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.

112 Stat. 2681. Section 314 unequivocally prohibits IHS and BIA from disbursing any funds for CSC other than those funds Congress specifically made available for payment of CSC by the listed Public Laws for fiscal years 1994 through 1998, whether through statutory provisions or earmarks in committee reports. Section 314 states that these are the "total amounts available" for CSC for contracts, etc., funded by such appropriation laws for fiscal years 1994-1998. To make it clear that Section 314 operates to contain the total amounts available by law for CSC for such contracts, etc., for fiscal years 1994-1998, Section 314 begins with the phrase "[n]otwithstanding any provision of law."

CSC includes start up costs under subsection 106(a)(5) of the Indian Self-Determination and Education Assistance Act (ISDEA). 25 U.S.C. 450j-1(a)(5). Because start up costs are a subset of CSC, start up costs are covered by section 314. Furthermore, by definition, start up costs are one time costs incurred "during the initial year that a self-determination contract is in effect." *Id.* Thus, start up costs for contracts, etc., funded by the Public Laws listed in section 314 for fiscal years 1994-1998, which have remained on the queue, are CSC relating to those years. Section 314, therefore, legally precludes use of any part of the $35 million in new funds for CSC in 1999 for start up costs associated with those contracts, compacts or annual funding agreements.

I regret the timing of this legal advice which comes after considerable consultation with the tribes over how the $35 million should be distributed. However, I feel that I have no choice but to issue this memorandum advising that IHS has no legal authority to use any part of the $35 million for start up costs for contracts, grants, compacts or annual

funding agreements funded by the fiscal year 1994-1998 appropriations acts. Such payments are prohibited by law. Thus, the distribution plan for the $35 million should be revised.

/s/ Duke McCloud
DUKE MCCLOUD

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Civil Action No. CIV99-092-S

CHEROKEE NATION OF OKLAHOMA; and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

DONNA E. SHALALA, Secretary of the United States Department of Health and Human Services; and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,
Defendants.

DECLARATION OF CARL L. FITZPATRICK

I, Carl L. Fitzpatrick, declare as follows:

1. I am the Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service. I have held this position for four years.

2. The Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service (IHS) is responsible for formulating and executing the IHS budget. I have personal knowledge regarding the IHS Headquarters budget, contract support cost allocations, and reserves and past year appropriations accounts.

3. IHS' total appropriations from Congress for Indian Health Services in fiscal years 1996 and 1997 were $1,747,842,000 and $1,806,269,000, respectively. The IHS obligated all of the funds that Congress provided in its Indian Health Services appropriations for those years for programs

serving tribes, either directly or through self-determination contracts and compacts, with the exception of some minor unobligated sums.

4. The annual appropriation for Indian Health Services is structured on the basis of budget subactivities such as, Hospitals and Clinics, Dental, Mental Health, Alcohol and Substance Abuse, Immunization, Tribal Management, and Contract Support Costs. IHS' overall budget allocations for these various subactivities for fiscal years 1996 and 1997 are set forth in the budget tables attached as Exhibit F.

5. Congress approved these subactivities during the budget process as appropriate purposes for IHS' expenditure of the funding. IHS submitted its budget request for fiscal years 1996 and 1997 based on these subactivities for Congress' review in the so-called Congressional Justifications, by which IHS explains its portion of the President's budget request to Congress prior to the start of the fiscal year. Then, when Congress actually appropriated the money for those fiscal years, it earmarked the funds for each subactivity for which the appropriation was intended by specifically listing funding for the subactivities in its appropriation committee reports. In addition, the appropriation statutes for fiscal years 1996 and 1997 in the Administrative Provisions for the Indian Health Service stated that "the appropriation structure for the Indian Health Service may not be altered without advance approval of the House and Senate Committees on Appropriations."

6. The amounts listed in the Congressional Justifications for IHS' budget request for Indian Health Services are usually less than IHS originally sought. For example, in 1996 IHS originally sought $161,240,000 in contract support costs but ultimately was allocated only $153,040,000. Similarly, in 1997 it originally requested $173,629,000 but was ultimately only allocated $160,660,000.

7. There is a two year lead time in preparing the President's budget for any given fiscal year so that budget requests (such as for contract support costs) are based upon estimates of need made far in advance of the fiscal year for which funds are appropriated. During that process, IHS' funding requests are reviewed by the Department of Health and Human Services (HHS) and the Office of Management and Budget (OMB) and usually reduced. IHS submits its original budget request to HHS which usually reduces it because of competing interests within the Department. HHS, in turn, submits the request to OMB, which usually reduces it further due to competing interests within the Government. Finally, the request is incorporated into the President's budget request to Congress, in which IHS' request for funding is set forth in the Congressional Justifications. At that point Congress appropriates only as much money as it sees fit. In other words, IHS cannot request an unlimited amount of funding and reasonably expect ultimately to receive it from Congress.

8. However, in order to inform Congress of any shortfalls in contract support costs in IHS' budget, IHS reports those shortfalls to Congress every year. For example, IHS submitted a shortfall report which indicated a $81,996,000 shortfall in contract support costs for fiscal year 1997. In 1996 IHS did not submit a formal report but submitted information to the House and Senate Appropriations Committees indicating a $43,000,000 shortfall in contract support costs for 1996.

9. IHS allocates its annual Indian Health Services appropriation either to its Area Offices for health services programs or to its Headquarters Office for Headquarters managed activities.

10. With respect to the first of these categories, IHS distributes most of its funds to its twelve Area Offices each year for the direct operation of programs or the funding of

tribal contracts and compacts under the Indian Self-Determination Act. Most of the appropriation is allocated to the Area Offices on a recurring basis (*i.e.* based on the previous year's allocations plus inflationary increases). Tribal and IHS operated services programs are funded from the various subactivities of the appropriation discussed above, *i.e.*, Hospital and Clinics, Dental Services, Mental Health, Alcohol and Substance Abuse, Public Health Nursing, Health Education, Immunization, Urban Health, Contract Support Costs, and other similar subactivities. In fiscal year 1997, IHS allocated to the Area Offices approximately $1,368,893,059 of the total approximately $1.8 billion annual appropriation on a recurring basis within the various budget subactivities. For fiscal year 1996, IHS allocated to the Area Offices on a recurring basis approximately $1,313,990,083 of the total approximately $1.75 billion appropriation.

11. The remainder of IHS' total annual lump-sum is retained each year by IHS Headquarters for Headquarters' managed activities. A portion of the retained Headquarters' funds are kept in reserve accounts and allocated on a non-recurring basis (*i.e.* toward expenses that do not occur in the same Area every year) to the Area Offices during the year as needs arise. In fiscal year 1996 IHS Headquarters retained the following reserve accounts for unanticipated, non-recurring expenses pertaining to the following categories of services: $11,571,233 for Hospitals and Clinics; $1,171,900 for Dental; $702,500 for Mental Health; $2,194,600 for Alcohol/ Substance Abuse programs; $870,000 for Public Health Nursing; $1,081,700 for Health Education; $2,295,100 for Community Health Representative programs; $494,800 for Indian Health Professions scholarship and extern programs; $277,000 for Headquarters Direct Operations; $8,665,700 for Self- Governance negotiation and shortfalls; and $9,913,900 for Contract Health Care services. In 1997 IHS Headquarters retained reserve accounts for nonrecurring allocations to Area Offices largely for these same purposes. The budget tables

setting forth the reserve account expenditures for 1996 and 1997 are attached as Exhibits G and H.

12. As those budget tables show, the reserve accounts were subdivided to pay for specific categories of services within budget subactivities. For instance, for fiscal year 1996, the $11,571,233 reserve for "Hospitals and Clinics" subactivity was further subdivided to pay for the following: $4 million for the IHS Director's Emergency Fund to pay for emergency situations that might arise throughout the national IHS health delivery system over the course of the fiscal year; $638,600 for Health Promotion/Disease Prevention (HP/DP) activities; $224,733 for Model Diabetes programs; $1,195,200 for Nursing Initiatives; $750,000 for the IHS Epidemiology Center; $1,500,000 for Collection and billing activities; $75,000 for Non-Physician COSTEP activities; $1,707,100 for Recruitment and Retention of personnel; and $1,012,500 for program evaluation. For fiscal year 1997, these Headquarters' reserve accounts were subdivided for expenditure for similar purposes.

13. As the attached budget tables show, all of the money reserved by IHS Headquarters for fiscal years 1996 and 1997 for allocation to the Area Offices on a nonrecurring basis was spent for these and the other purposes listed on the budget tables during the fiscal year, leaving a zero balance at the end of the fiscal year.

14. In addition to the reserve accounts allocated to the Area Offices on a nonrecurring basis, the remainder of the amounts retained by Headquarters were spent for Headquarters managed activities. This included approximately $15.4 million as a Headquarters residual amount which is not subject to contracting. These residual funds support inherently federal functions needed for the IHS to function as a federal agency even if all IHS programs were contracted or compacted by tribes.

15. The rest of the Headquarter's retained amounts for fiscal years 1996 and 1997 (with the exception of certain funds managed by Headquarters and specifically earmarked by Congress for particular purposes such as scholarships for individuals) were subject to contracting or compacting as tribal shares of Headquarters administrative support functions. Each tribe may contract or compact only its share of these retained funds supporting Headquarters administrative support functions. Those tribal shares which are contracted or compacted are distributed to tribal contracts and compacts. Those tribal shares for tribes served directly by the IHS are retained by Headquarters to fund administrative support services for those tribes.

16. At the end of each fiscal year there is generally a very small sum of "unobligated" money. My office becomes aware of these unobligated funds after the close of the fiscal year around mid-October when the IHS completes its accounting process for closeout of the fiscal year. In fiscal year 1996 IHS had $786,042 in unobligated funds, and in fiscal year 1997 it had $417,045. The appropriation account remains available for five years for recording, adjusting, and liquidating obligations properly chargeable to that fiscal year appropriation account. As of the present time, all funds from those fiscal year appropriations have been spent either for IHS' direct operation of programs for tribes, or for the funding of self-determination contracts and compacts that allow Tribes to operate the programs themselves.

17. Within IHS' appropriation for Indian Health Services for fiscal years 1996 and 1997, Congress earmarked in its appropriation committee reports $153,040,000 in 1996 and $160,660,000 in 1997 to be spent on contract support costs. These contract support funds were allocated to the Area Offices for tribal contracts and compacts for fiscal years 1996 and 1997 as shown in the attached tables. Exhibit I. As explained above, reprogramming additional funds for contract

support costs would have required IHS to use money otherwise dedicated to other purposes supporting health services delivery to tribes.

18. For example, for IHS to have paid the Cherokee Nation additional contract support costs of 3.4 million in 1997, IHS would have been required to deduct $3.4 million from funding that was otherwise obligated, for example, to the diabetes program, the epidemiology center, and dental and mental health services. That money was distributed to the area offices on a recurring basis to be spent for these and other services, or it was kept in the Headquarters reserve fund for needs that arose in those categories during the year. With respect to Shoshone, IHS would similarly have been required to take away funding from other Tribes or programs in the amount of $3.5 million in order to pay Shoshone the additional contract support costs it is claiming for 1996 and 1997.

19. If IHS were required to pay the shortfalls in contract support costs requested by every Tribe that was a party to a self-determination contract or compact in fiscal years 1996 and 1997, IHS would be required to deduct approximately $125 million from amounts supporting programs for other tribes for those years.

20. Congress' finite appropriations to IHS must be divided among IHS and hundreds of Tribes or Tribal groups to pay for the operation of approximately 150 health service units throughout the United States. The 150 service units include some 500 direct health care facilities, 49 hospitals, 195 health centers, 8 school health centers, and 289 health stations, satellite clinics and Alaska village clinics. See HHS Justification of Estimates for Appropriations Committees, 1998, at 4.

21. As of 1996, IHS directly operated approximately 65% of its service units. The remaining 35% were operated by

Tribes and tribal organizations which had entered into self-determination contracts and compacts with HHS pursuant to the Indian Self-Determination Act.

22. Congress has consistently underfunded contract support costs in connection with self-determination contracts. In 1996, for example, the Secretary received requests for contract support costs for newly acquired or expanded programs that exceeded the $7.5 million allocation for that purpose by $29.2 million. Similarly, in 1997 the Tribes' requests for contract support costs for newly acquired or expanded programs exceeded the $7.5 million allocation for that purpose by $41.6 million. During those years, the remainder of Congress' lump-sum allocation for contract support costs was completely committed to the funding of already existing programs, whose contract support costs were covered by self-determination contracts with a multitude of Tribes nationwide.

23. IHS, therefore, implemented guidelines explaining how the Secretary would distribute new contract support costs in the event of such appropriations shortfalls. *See* IHS Circular 96-04; ISD Memorandum 92-2. IHS determined that it would place all requests in a queue or priority list based on date of receipt. Approved requests for contract support costs would be 100% funded on a first come first served basis. Once funds were exhausted, however, Tribes on the priority list would be provided new contract support cost funds according to the date of the individual request, when additional appropriations for contract support costs were made available. In the year a Tribe reached the top of the queue, it would be paid its new contract support costs for that year and would continue to be paid at least that amount of contract support costs for the newly funded program every year thereafter.

24. IHS developed this policy with the active participation of representatives from Indian Tribes. The procedures have been applied to self-determination contracts since 1992 and were subsequently applied to self-governance compacts. Tribal consultation has thus been an integral part of the formulation and implementation of IHS' policy. Indeed, the queue system was an alternative to a pro-rata distribution of contract support costs which many Tribes have opposed.

25. Cherokee was placed on the Indian Self Determination queue in 1996 for contract support costs for its three newly contracted health programs, with the understanding that sufficient Congressional appropriations were not presently available. In 1997 IHS had already spent its $7.5 million allotment on Tribes ahead of Cherokee on the queue for new contract support costs, and Cherokee had not yet reached the top of the queue. Thus, Cherokee did not receive any additional funding for contract support costs for those new programs in fiscal year 1997.

26. Shoshone was placed on the Indian Self determination queue in 1995 for contract support costs for its newly contracted health programs, with the understanding that sufficient Congressional appropriations were not presently available. In 1996 and 1997 Shoshone had not yet reached the top of the queue. Thus, Shoshone did not receive any additional funding for contract support costs for these new programs in either 1996 or 1997. The IHS had already allocated its $7.5 million allotment for new contract support costs to Tribes ahead of Shoshone on the queue.

27. In fiscal year 1996 IHS Headquarters allocated $14,073,600 for contract support costs to the Oklahoma Area Office (which is the Office that distributes funding to Cherokee). In fiscal year 1997, IHS allocated $18,512,000 for contract support costs to the Oklahoma Area Office. The difference is due to an additional allotment of $4,438,400 from the $7.5 million ISD fund for 1997 for an Oklahoma

tribe at the head of the queue. The chart attached as Exhibit I sets forth the 1996 and 1997 Area allocations. These contract support funds were distributed to Tribes by the Oklahoma Area Office (with the exception of the additional ISD allotment in 1997) to pay for contract support costs for existing contracted programs, *i.e.*, programs that tribes had already contracted or compacted for and not new and expanded programs for which requested contract support costs were placed on the ISD queue.

28. As noted above, the chart indicates that the Oklahoma Area Office received a $4,438,400 increase in contract support funding for fiscal year 1997. This increase was attributable to the Area Office's receipt of additional funds for "new" contract support costs in that year, *i.e.*, contract support costs for new or expanded contracted programs at the head of the queue before the Cherokee requests. Because Tribes that reach the top of the queue and receive new contract support costs received that same amount every subsequent year, the $4,438,400 in new contract support costs for fiscal year 1997 became part of the Oklahoma Office's "base" funding for existing Contract support costs for subsequent years.

29. I am advised that Cherokee was paid approximately $1.6 million in indirect contract support costs in 1996 and again in 1997 for its "existing" programs not on the queue. Cherokee's funding was not increased above that amount because Congress did not appropriate additional funding for contract support costs to the IHS for existing contracts. Furthermore, the Oklahoma Area Office did not receive an increase in allocations from the $7.5 million appropriated for the ISD Fund for that year for the "new" Cherokee programs on the queue because they were not at the head of the queue list. As explained above, if IHS had provided Cherokee with more than $1.6 million in indirect contract support costs for Cherokee's contracted programs, IHS would have had to

reduce the funds provided to other Tribes or used for Tribal programs.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Date: 9/3/99

/s/ Carl L. Fitzpatrick
CARL L. FITZPATRICK

[See JA Vol. II, PART 1 for attached tables]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

02-1286

TOMMY G. THOMPSON,
Secretary of Health and Human Services,
Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,
Appellee.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
04/09/03	18	PER PANEL REQUEST. COUNSEL TO PROVIDE SUPPLEMENTAL BRIEFING NOT TO EXCEED 10 PAGES. DUE IN 10 DAYS FROM THIS DATE. (EOD BY KSH ON 4/9/03) 02-1286
04/24/03		CHEROKEE NATION OF OKLAHOMA (APPELLEE)—APPELLEE'S SUPPLEMENTAL BRIEF (MS-04/24/03). FILED: 04/24/03. [032187] (EOD 04/25/03 BY JAB) 02-1286 SUPP. BRIEF & ATTACHMENTS 1-6
04/28/03	22	ORDER: THE COURT HAS DETERMINED THAT THE SECRETARY'S BRIEF IS NOT RESPONSIVE TO THE COURT'S REQUEST FOR SUPPLEMENTAL BRIEFING. THEREFORE, IT IS ORDERED THAT: THE SECRETARY SHALL SUBMIT BY COB ON 5/12/03 A REVISED SUPPLEMENTAL BRIEF

DATE	NO.	PROCEEDINGS
		DIRECTLY ADDRESSING (FS-04/28/03) RECEIVED: 04/28/03 22A. THE AMT. OF FUNDS AVAILABLE DURING EACH OF THE FISCAL YEARS 1994-1996, ETC. (EOD 04/28/03) (KSH) 02-1286
05/12/03		TOMMY G. THOMPSON. Secretary of Health and Human Services [APPELLANT] —REVISED SUPPLEMENTAL BRIEF OF APPELLANT TOMMY G. THOMPSON (MS-05/12/03). FILED: 05/12/03. [032204] (EOD 5/12/03 BY CLI 02-1286 SUPP. BRIEF & ATTACHMENT WITH EXHIBIT
07/03/03		AFFIRMED. PRECEDENTIAL OPINION BY: J. DYK. JUDGMENT ENTERED: 07/03/03. NO COSTS. OPINION SENT TO PARTIES: 07/03/03. (EOD 07/03/03 BY KSH) 02-1286
08/13/03		APPELLANT—COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC (MS-08/18/03) FILED: 08/18/03. PETITION CIRCULATED: 08/18/03. PETITION CIRCULATED: 08/20/03 EN BANC CIRCULATED: 09/02/03 PETITION/EN BANC DENIED/DENIED ON 09/12/03. (EOD 09/12/03 BY AVV) 02-1286
03/22/04		PETITION FOR WRIT OF CERTIORARI FILED 12/11/03. SUPREME COURT #: 03-853. CERT. GRANTED ON 03/22/04. (EOD 03/31/04 BY AV) 02-1286

INTERIOR BOARD OF CONTRACT APPEALS

Nos. 3877-98 through 3879-98

Appeals of CHEROKEE NATION OF OKLAHOMA,
P.O. Box 948, Tahlequah, Oklahoma 74465-0948,
Contractor-Appellant,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
(INDIAN HEALTH SERVICE),
Appellee.

RELEVANT DOCKET ENTRIES

NO.	PROCEEDINGS
1.	Notice of Appeal dated January 27, 1998.
5.	Appeal File dated March 13, 1998.
6.	Appellant's Complaint dated April 17, 1998.
8.	Government's Answer dated June 17, 1998.
9.	Letter from IBCA to parties urging settlement negotiations, dated June 22, 1998.
16.	Appellant's counsel motion for partial summary judgment and accompanying memorandum in support with affidavit of authentication of documents dated January 7, 1999.
17.	Government's counsel brief supporting motion to dismiss dated December 31, 1998.

NO.	PROCEEDINGS
21.	Appellant's opposition to motion to dismiss; request for oral argument: memo in support of motion for partial summary judgment & affidavit of CHead dated February 17, 1999.
22.	Government's brief in response to motion for partial summary judgment (liability) with declarations of DJCesari and RBDeMaray dated February 18, 1999.
36.	Written Opinion: Appellant's motion for summary judgment granted: Government's motion to dismiss denied dated June 30, 1999.
37.	Letter to the Board from the Government's counsel re: Agreement not to engage in any further proceedings regarding quantum while Government proceeds to file Notice of Appeal with Federal Circuit Court dated August 12, 1999.
38.	Order deferring quantum negotiations during judicial review dated August 18, 1999.
39.	Notice of Docketing at U.S. Court of Appeals for the Federal Circuit dated November 1, 1999
41.	Letter to the Board from Appellant's counsel requesting a status conference with recommendations and attached USCAFC Order dated February 25, 2000, dated March 15, 2000.

NO.	PROCEEDINGS
45.	Government's counsel motion for leave to move for reconsideration of partial summary judgment on (liability); brief in support and declaration of CLFitzpatrick with attachments dated March 27, 2000.
48.	Order confirming agreement as to discovery and settlement negotiations dated April 26, 2000.
61.	Decision: Government's motion for reconsideration granted dated October 31, 2000.
65.	Government's supplemental brief in opposition to partial summary judgment and exhibits dated December 29, 2000.
76.	Written Opinion on Reconsideration: Appellant's Motion for Summary Judgment Granted: Government's motion for Dismissal denied dated March 21, 2001.
92.	Joint stipulation on quantum dated November 9, 2001.
93.	Order accepting the parties joint stipulation on quantum dated November 15, 2001.
94.	Notice of Docketing at the U.S. Court of Appeals for the Federal Circuit (02-1286) Tommy F. Thompson, Secretary of Health and Human Services v. Cherokee Nation of Oklahoma dated March 18, 2002.

[SEAL]

CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465-O948
(918) 456-0671

Joe Byrd
[Illegible]
Principal Chief

James "Garland" Eagle
[Illegible]
Deputy Principal Chief

September 27, 1996

VIA FEDERAL EXPRESS
AND CERTIFIED U.S. MAIL

Dr. Michael H. Trujillo, Director
Indian Health Service
Department of Health and Human Services
5600 Fishers Lane, Room 6A-05
Rockville, Maryland 20857

Re: Enclosed Contract Disputes Act claim
For FY 1994, 1995, and 1996 Indirect Costs

Dear Dr. Trujillo:

The Cherokee Nation hereby claims the right to immediate payment of amounts immediately due and owing to the Nation under the provisions of the Nation's 1994, 1995, and 1996 Annual Funding Agreements for its Compact of Self-Governance with the United States. This claim is submitted pursuant to the provisions of the Contract Disputes Act, 41 U.S.C. Sec. 601 et seq. Sub Sec. 110(d) and 403(h) the Indian Self-Determination Act as amended.

The amounts owed to the Nation are ONE MILLION SEVEN HUNDRED SIXTY-NINE THOUSAND ONE HUNDRED FORTY-EIGHT DOLLARS ($1,769,148) for

FY 1994 Indirect Costs, TWO MILLION SEVEN HUNDRED NINETY-FOUR THOUSAND FIVE HUNDRED NINETY-FIVE DOLLARS ($2,794,595) for FY 1995, Indirect Costs, and ONE MILLION EIGHT HUNDRED FIVE THOUSAND TWO HUNDRED SIXTY-SIX DOLLARS ($1,805,266) for FY 1996 Indirect costs, for a total claim for all three years of SIX MILLION THREE HUNDRED SIXTY-NINE THOUSAND NINE DOLLARS ($6,369,009). Each of the Nation's Annual Funding Agreements have provided that the Nation would be paid at each year's negotiated indirect cost rate, and that that rate would be multiplied by the IHS base for that year to arrive at the correct dollar amount. Despite the clear terms of the AFAs, for each year the Nation was in fact paid a much smaller amount for indirect costs. Our claim is for the unpaid balance due for each year in question, and fully credits the United States for the Indirect Cost amount actually paid to the Nation each year.

In support of this claim I enclose the following documents: (1) a worksheet prepared by the Nation showing the indirect cost that was due under each MA, the amount actually funded, and the balance owed (Exhibit 1); (2) a copy of a September 6, 1996 Letter to you from our legal counsel requesting an informal resolution of the Nation's claim, and describing the claim in (Exhibit 2); (3) the Nation's FY 1994 Annual Funding Agreement, and the Addenda thereto (Exhibit 3); the Nation's FY 1995 Annual Funding Agreement, and the Addenda thereto (Exhibit 4); and (5) the Nation's FY 1996 Annual Funding Agreement, and the Addenda thereto (Exhibit 5).

Please recall that, under the terms of the Prompt Payment Act, 31 U.S.C. Sec. 3901 et. seq. and the Contract Disputes Act, 41 U.S.C. Sec 611, interest is accruing on the amount due.

We would appreciate your prompt decision on this claim.

Sincerely,

/s/ David Kingfisher md for
JOE BYRD, Principal Chief

JB:ft

cc: Paula Williams, Director, Office of Tribal Self-Governance Lloyd Miller, Esq.

CERTIFICATION
OF CONTRACT DISPUTES ACT CLAIM

I, Joe Byrd, Principal Chief of the Cherokee Nation, hereby certify as follows on behalf of the Nation:

(1) the above claim is made in good faith;

(2) the supporting data are accurate and complete to the best of my knowledge and belief;

(3) the amount requested accurately reflects the adjustment for which the Nation believes the government is liable; and

(4) I have been duly authorized to certify this claim on behalf of the Cherokee Nation.

DATED this 27th day of September, 1996.

CHEROKEE NATION
/s/ David Kingfisher md
JOE BYRD, Principal Chief

LAW OFFICES
SONOSEY, CHAMBERS, SACHSE,
MILLER & MUNSON
SUITE 700
900 WEST FIFTH AVENUE
ANCHORAGE, ALASKA 99501-2029
(907) 258-6377
TELEFAX (907) 272-8332

MARVIN J. SONOSKY
HARRY R. SACHSE
REID PEYTON CHAMBERS
WILLIAM R PERRY
LLOYD BENTON MILLER*
DOUGLAS B.L. ENDRESON
MYRA M. MUNSON*
ANNE D. NOTO
KAY E. MAASSEN GOUWENS*
RICHARD A POULIN*
MARY J. PAVEL
TARA A. SHER
JAMES E GLAZE*
COLIN C. HAMPSON
OF COUNSEL
ARTHUR LAZARUS
DON CLOCKSIN*
TASSIE M.K HANNA
LINDSAY R. NAAS
*ALASKA BAR

JUNEAU OFFICE
229 FOURTH STREET
JUNEAU, ALASKA 99801
(907) 586-5880
TELEFAX (907) 586-5883

WASHINGTON, D.C.
OFFICE
SUITE 1000
1250 EYE STREET, N.W.
WASHINGTON, D.C. 20005
(202) 682-0240
TELEFAX (202) 682-0249

September 6, 1996

VIA FACSIMILE AND OVERNIGHT MAIL

Dr. Michael H. Trujillo
Director
Indian Health Service
Parklawn Building
5600 Fishers Lane
Room 6-05
Rockville, Maryland 20857

Re: Cherokee Nation Annual Funding Agreements for Fiscal Years 1994, 1995 and 1996 (Our File No. 5401.53)

Dear Dr. Trujillo:

The Cherokee Nation has asked us to assist it in informally exploring a resolution with you of a funding deficiency under the Nation's Annual Funding Agreements for the past three years. Let me explain briefly the situation.

In the Cherokee Nation's 1994 Annual Funding Agreement (the first year the Nation was under self-governance with IHS), the Nation and IHS agreed that the Nation would receive indirect costs calculated at the Nation's final negotiated 1994 rate (which was 14.3 percent). This Agreement was stated in a very straightforward provision of section 6:

> The amount of funds allocated to the Nation under this Annual Funding Agreement for indirect costs shall be established and paid based upon determination of the actual rate that is negotiated for the current Self-Determination contracts, grants and subject to the availability of appropriations for this purpose.

Despite this fairly straightforward language the Nation ended up being paid a much smaller amount, apparently based upon some unexplained prior amount fixed in the IHS system. The Nation was not even paid based on its application of prior year's rate of 12.3 percent.

The same problem occurred in fiscal year 1995, when the Nation's final negotiated rate increased to 17.1 percent but the Nation was again only paid according to some unexplained prior amount fixed in the IHS system—again, an amount not even calculated at the Nation's 1993 rate of 12.3 percent (at that point a rate that was two years out of date). The 1995 Annual Funding Agreement stated plainly:

> The amount of funds allocated to the Nation under this Annual Funding Agreement for Indirect Cost Funding shall be established and paid based upon the Nation's approved Indirect Cost Agreement for 1995.

Finally, although the Nation's proposed indirect rate in fiscal year 1996 is 14.7 percent, once again the Nation has apparently only paid the old amount—again, not even equal to the old 1993 rate multiplied by the old 1993 base. The 1996 Annual Funding Agreement states plainly:—

> The amount of funds allocated to the Nation under this Annual Funding Agreement for Indirect Cost Funding shall be established and paid based upon the Nation's approved Indirect Cost Agreement for 1996.

When we reviewed these documents it seemed to us that there must be some error, possibly in Headquarters, possibly in the Oklahoma Area office. The three Annual Funding Agreements could not be clearer on the obligation to pay, and they are not made subject to any IHS circulars or other policies.

The Nation's position is fairly straightforward. Their Annual Funding Agreements guarantee that they will be paid at each year's negotiated indirect cost rate, and that rate must be multiplied by the IHS base each year to arrive at the correct amount. Indeed, the whole purpose of negotiating an indirect cost rate each year with the Office of Inspector General is to determine the size of the pool which the Nation needs to run its programs, and thus the contribution the Nation needs from the Indian Health Service and every other agency that funds the Nation. Although the BIA has not always had sufficient funding to fund the Nation at 100 percent of its indirect costs, it has always provided the Nation maximum funding based upon the correct rate for each year applied to the correct base for each year. For whatever reason, it appears this has not occurred in recent years with IHS.

The Nation has specially requested that we write to you in an effort to seek an informal resolution of this matter. Toward that end, we have been instructed to send copies of this request to the Office of Tribal Self-Governance, the Office of Tribal Activities, and the Area Director. On behalf of the

Nation, we are available to meet with you during the Reno/Sparks National Self-Governance Conference where representatives of the Cherokee Nation will be in attendance. In any event, we request a. meeting with you in Tucson on September 18th, 1996 contemporaneous with the National Indian Health Board meeting.

We look forward to informal and productive discussions on this matter with you and your staff.

Sincerely,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

By: Lloyd Benton Miller
LLOYD BENTON MILLER

LBM: rmc

cc: Mr. Charles L. Head
Mr. Rick Kelly, Director
Dr. David Kingfisher, Executive Director
Myra M. Munson, Esq.
Ms. Paula Williams, Director
Office of Tribal Self-Governance
Mr. Doug Black, Director
Office of Tribal Activities
Mr. Randy Grinnell, Acting Area Director

FY—1994 ANNUAL FUNDING AGREEMENT ATTACHMENT 1 TO COMPACT OF SELF-GOVERNANCE BETWEEN THE UNITED STATES OF AMERICA AND CHEROKEE NATION

Section 1—Preamble.

This Annual Funding Agreement is executed by and between the United States of America and Cherokee Nation pursuant to Title III of P.L. 93-638 and is incorporated into and governed by the Compact of Self-Governance entered into between the Cherokee Nation and the Secretary of the Department of Health and Human Services on October 1, 1993.

Section 2

The Nation is authorized to plan, conduct, consolidate, administer and, subject to the terms of the Compact, redesign the services and reallocate funding identified within the General Budget Categories as a consolidated tribal government budget:

STANDARD INDIAN HEALTH SERVICE PROGRAMS	FY-94 DOLLARS	TOTAL DOLLARS
Hospital & Health Clinics	$6,403,560.00	
Dental Services	$ 836,409.00	
Mental Health	$ 952,035.00	
Alcohol & Substance Abuse	$ 609,532.00	
TOTAL CLINICAL SERVICES (1,2,4)		$8,801,536.00
Contract Health Services		$ 475,054.00
TOTAL CONTRACT HEALTH SERVICES (1,2,4)		475,054.00
Public Health Nursing	$ 507,074.00	
Health Education	$ 105,949.00	
Community Health Reps.	$1,505,654.00	
TOTAL PREVENTIVE HEALTH (1,2,4)		$2,118,677.00
Environmental Health Support Facility Support	$ 476,262.00	

TOTAL FACILITIES & ENVIRONMENTAL HEALTH SUPPORT (1,2,4)	$ 476,262.00
TOTAL STANDARD INDIAN HEALTH SERVICE PROGRAMS	$11,871,529.00

Section 3

The Nation is not authorized under this Annual Funding Agreement to redesign, shift or transfer any funding for services identified within the General Budget Categories which are subject to special restriction imposed by congressional directives:

CONGRESSIONAL EARMARKED PROGRAMS	FY-93 DOLLARS	TOTAL DOLLARS
Sanitation Facilities		
TOTAL CONGRESSIONAL EARMARKED PROGRAMS(3,4)		
INDIRECT TOTAL ALL PROGRAM FUNDS @ 12.3%		$ 1,460,198.00
TOTAL FUNDS		$13,331,727.00

FOQTNOTES:

1. FY'94 increases for population growth, mandatories and contract support are not included in the Funding Agreement. Funding will be adjusted when the actual FY'94 appropriation becomes available.
2. FY'94 non-recurring funds are not included in the Funding Agreement and will be adjusted when the actual FY'94 appropriation becomes available.
3. Public Law 86-121, Sanitation Facilities' Construction Funds; for regular, housing and special projects will be modified into the Funding Agreement when they become available..
4. The parties stipulate (i) that $13,331,727, the recurring base for Fiscal Year 1994 including indirect costs at (12.3%), represents an undisputed. portion of the total

funds to be provided by the Secretary pursuant. to Article IV, Section 3, of the Compact of Self-Governance; (ii) that additional funds are to be provided for under this Annual Funding Agreement; but (iii) that the parties are presently unable to agree on the amount of the additional funds and before the deadline imposed by Section 6 of this Annual Funding Agreement, execute an addendum hereto setting forth the amount of additional funds to be provided pursuant to this Annual Funding Agreement. The parties further stipulate that neither party accepts the methodology used by the-other in arriving at the amounts to be provided by the Secretary under the Compact and this Annual Funding Agreement.

Section 4—Services not Covered by this Agreement. The following services are not included within this Annual Funding Agreement:

—Headquarters East—All services, excluding Cherokee Nation's share of Assessments/Supply and Service Funds.

—Headquarters West—Data Processing Service Center, RPMS technical and training functions, non-recurring identified resourced programs.

—Oklahoma: city Area Office—RPMS Computer technical support, training personnel, travel and .equipment.

—Contracts retained under P.L. 93-638—Sallisaw Equipment Acquisition Management, Stilwell Equipment Acquisition Administrative, Sallisaw Construction, Stilwell Construction, Stilwell Equipment Acquisition Management. Buy-Indian contract—Regional Adolescent Treatment Center.

The, Nation retains-the right to negotiate with the Secretary under the provisions of P.L. 93-08, as amended to include such services in the Annual Funding Agreement at a later date.

Section 5—Items of Dispute and Items and issues in dispute will be listed in and- be a part of the Annual Funding Agreement. A decision on the disputed issue(s) will be made by the Secretary no later than 30 calendar days after the negotiation date. If the decision is in favor of the Nation, the funding will be added to the annual funding agreement. The formal written decision will be filed and become a part of the Annual Funding Agreement.

Section 6—Indirect Cost Funding. The amount of funds allocated to the Nation under this annual funding agreement for indirect costs shall be established and paid based upon determination of the actual rate that is negotiated foe the current Self-Determination contracts, grants and subject to the availability of appropriations for this purpose.

Section 7—Adjustments due to Congressional Actions. The parties agree that adjustments may be made due to Congressional action. Upon enactment of relevant Appropriations Acts, the amount will be adjusted as necessary and the Nation notified of such actions. It is recognized there may be variances which may need to be renegotiated. Each party agrees to correct such variances as they are identified and notify the other party.

Section 8—Previous P.L. 93-638 contracts/grants funds. Under the terms of this agreement, funds remaining from previous P.L. 93-638 contracts/grants, at the effective date of this agreement, are to be expended according to the terms of this compact and are not subject to he previous contracts/grants.

Section 9—No Limits or Reductions in Services to other Tribes. Pursuant to Section 306 of P.L. 93-618, as amended. nothing in this Annual Funding. Agreement limits or reduces in any way services that any other Indian tribe or tribal organization is eligible to receive.

DATED THIS 30 DAY OF JUNE, 1993.

CHEROKEE NATION

/s/ Wilma P. Mankiller
WILMA P. MANKILLER
Principal Chief

UNITED STATES OF AMERICA

By: /s/ [illegible]
Director, Indian Health Service
Department of Health and Human Services

DEPARTMENT OF HEALTH & HUMAN SERVICES

[SEAL]

Public Health Service
Indian Health Service
Rockville MD 20857

TO: Acting Director
Through IHS/OD/OHQO

FROM: Acting Director
Office of Tribal Self-Governance

SUBJECT: Request Approval of Addendum to FY-1994 Annual Funding Agreement (Attachment I to Compact of Self-Governance with the Cherokee Nation of Oklahoma)

ISSUE

I have attached the Addendum to the fiscal year (FY) 1994 Annual Funding Agreement (Attachment I to Compact of Self-Governance with the Cherokee Nation of Oklahoma). We met with the Nation on July 13, 1993, to resolve funding issues related to tribal shares of Indian Health Service (IHS) Area and Headquarters Offices.

DISCUSSION

On June 30, 1993, the IHS signed the compact and funding agreement submitted by the Nation.

The Nation has submitted the attached Addendum to their signed compact and funding agreement that addresses revisions that reflect the negotiated Area Office and Headquarters tribal shares. A further addendum to the FY 1994 Funding Agreement will be made within 30-45 days following the execution of this Addendum resolving the Nation's share of the inventory of the Ada Warehouse.

RECOMMENDATION

I recommend that you sign the attached Addendum to be made a part of and incorporated into the 1994 Funding Agreement.

DECISION

/s/MICHEL E. LINCOLN
Approved Disapproved

Date JUN 30, 1993

/s/ DOUGLAS BLACK
DOUGLAS BLACK

ADDENDUM TO FY-1994 ANNUAL FUNDING AGREEMENT (ATTACHMENT 1 TO COMPACT OF SELF-GOVERNANCE BETWEEN UNITED STATES OF AMERICA AND CHEROKEE NATION)

WHEREAS, on the 30th day of June, 1993, the United States of America ("U.S.") and Cherokee Nation ("CN") executed the FY-1994 Annual Funding Agreement ("1994 Funding Agreement") pursuant to the "Compact of Self - Governance between the United States of America and Cherokee Nation ("Compact"); and

WHEREAS, in negotiating the 1994 Funding Agreement, the US and CN were able to agree to a certain portion of the total funds to be delivered by the Secretary pursuant to Article IV, Section 3, of the Compact, but were unable to agree to the balance of the total funds to be so delivered, as noted in footnote 4 of the 1994 Funding Agreement; and

WHEREAS, the parties have successfully negotiated the balance of the total funds to be delivered by the Secretary pursuant to Article IV, Section 3, of the Compact, except for Cherokee Nation's share of the Ada Warehouse inventory and have agreed to memorialize their agreement in this Addendum.

NOW, THEREFORE, the US and CN agree as follows:

Section 1:

This Addendum shall be and is made a part of, and incorporated into, the 1994 Funding Agreement, and as such further incorporated into the Compact in accordance with Section 1 of the 1994 Funding Agreement.

Section 2:

In addition to the direct program funds previously agreed to between the parties hereto in the 1994 Funding Agreement, dated June 30, 1993, the US and CN stipulate and agree that for the purposes of the FY 1994 Funding Agreement, CN will receive as its tribal share of the IHS Oklahoma City Area and

National Offices, the sum of $2,300,000, plus the appropriate indirect costs as set forth in Section 6 of said FY 1994 Funding Agreement. The parties agree that $1,245,910 from the Oklahoma City Area Office and Headquarters budgets is the amount that the IHS would be reasonably able to make available through restructuring and downsizing during FY 1994. The remaining $1,054,090 will be provided by self-governance shortfall funding appropriated by the Congress. Said sums shall be made available upon the enactment of the Department of Health and Human Services 1994 Appropriations Bill. *See* Footnote (1)[1].

Section 3:

The parties further agree that Section 4 of the June 30, 1993, Funding Agreement should be, and is, amended to read as follows:

> Section 4—Services not Covered by this Agreement. The following services-are not included within this Annual Funding Agreement:
>
> Headquarters West-Data Processing Service Center, RPMS technical and training functions, non-recurring identified resourced programs.
>
> Oklahoma City Area Office-RPMS Computer: technical support, training, personnel, travel and equipment.
>
> Contracts retained under P.L. 93-638-Sallisaw Equipment Acquisition Management, Stilwell Equipment Acquisition Administrative, Sallisaw Construction, Stilwell Construction, Stilwell Equipment Acquisition Management. Buy-Indian Contract-Regional Adolescent Treatment Center.

[1] The parties agree that $2,300,000 represents a compromised amount, and that in stipulating to this sum neither party accepts the method or formula of allocation proposed or used Continued: by the other. The parties further agree that the amounts agreed to herein are intended to be in addition to, and not in lieu of, the amounts previously agreed to in the 1994 Funding Agreement dated June 30, 1993, and that all amounts in this Addendum and said FY 1994 Funding agreement apply only to funding for Fiscal Year 1994.

The Nation retains the right to negotiate with the Secretary under the provisions of P.L. 93-638, as amended, to include such services in the Annual Funding Agreement at a later date.

Section 4:

The US and CN agree that, in the 30-45 day period following the execution of this Addendum, they will enter into a further addendum to the FY 1994 Funding Agreement, resolving the CN's share of the inventory of the Ada Warehouse.

Section 5:

Except as provided in this Addendum, all other provisions of the FY 1994 Funding Agreement, dated June 30, 1993 shall remain unchanged.

DATED THIS 23 DAY OF AUGUST, 1993.

CHEROKEE NATION

/s/ Wilma P. Mankiller
WILMA P. MANKILLER
Principal Chief

UNITED STATES OF AMERICA

/s/ [ILLEGIBLE]
Director, Indian Health Service
Department of Health and Human Services

SECOND ADDENDUM TO THE FY 1994 ANNUAL FUNDING AGREEMENT (ATTACHMENT I TO THE COMPACT OF SELF-GOVERNANCE BETWEEN THE CHEROKEE NATION AND THE UNITED STATES OF AMERICA)

This Second Addendum to the FY 1994 Annual Funding Agreement dated June 30, 1993 (hereinafter, "Funding Agreement"), which is an attachment to the Compact of Self-Governance by and between Cherokee Nation and the United States of America dated June 30, 1993, is entered into by and between Cherokee Nation and the United States of America on this 27th day of September, 1993.

1. In addition to the funds previously agreed to between the parties hereto in the Funding Agreement, dated June 30, 1993 including the addendum incorporated into the Compact of Self-Governance of even date, the US and CN stipulate and agree that the share of the IHS operated Ada warehouse inventory is the sum of, One hundred sixty-four thousand six hundred and seventy-two dollars, ($164,672), and that said sums shall be made available to the Cherokee Nation upon the enactment of the Department of Health and Human Services 1994 Appropriations, and that said sums shall applied to funding for Fiscal Year 1994. The parties hereto further agree that the sum to be paid to Cherokee Nation pursuant to the previous paragraph (to wit, $164,672.00) is intended to be in addition to, and not in lieu of, the amounts previously agreed to in (1) the FY 1994 Funding Agreement, and (2) the First Addendum to said Funding Agreement dated August 23, 1993.

2. Funding allocations for costs associated with Cherokee Nation engaged IPA/MOA personnel for Fiscal Year 1994 shall be as follows: The IHS and the Nation shall determine, based on previous year experience, the expected savings resulting from "position lapse funding" (unexpended funds due to staff turnover occurring during FY-94, $30,000.00).

The expected savings shall be made available to the Nation no later than October 1. During the last month of FY-94 (September) when actual costs are known, adjustments in funding will be made accordingly.

3. The Nation may in its discretion continue to purchase drugs, medical and other supplies from the Ada regional warehouse and the IHS office of Self-Governance shall provide a line of credit for any such purchases, based on a dollar amount the Nation estimates its quarterly usage to be. On a quarterly basis the IHS will invoice the Nation for actual purchases and thereafter reimburse the Ada warehouse accordingly.

4. The parties further stipulate and agree that the meaning of Section I of Article II of the Compact of Self-Governance between the parties hereto is clarified to reflect that all programs, services and/or activities of contracts and grants entered into pursuant to P.L. 93-638 were and are to be conducted, furnished and/or performed without interruption during the remainder of FY 1993 up to the effective dates of the Compact of Self-Governance and Funding Agreement. For purposes of said programs, services and/or activities, the effective dates of the Compact of Self-Governance and the Funding Agreement are intended by the parties to be September 30, 1993. Furthermore, to the extent that any funds previously obligated under such contracts and grants are unexpended as of said effective date, the parties hereto intend that such unexpended funds shall be deobligated from such contracts and grants and reobligated to the Compact of Self-Governance and the Funding Agreement in order to fund the programs, services and activities to be conducted, furnished and/or performed as provided therein.

5. The parties also stipulate and agree that an additional sum of $4,005,051 is hereby obligated to the Funding Agreement to be expended on the programs, services and activities

conducted, furnished and/or performed hereunder for FY 1993 pursuant to paragraph 4 of this Addendum.

6. To the extent that any funds obligated to the Compact of Self-Governance during FY 1993 as stated in paragraphs 4 and 5, above, remain unexpended as of the end of said fiscal year, such unexpended funds shall be reobligated to, and expended pursuant to, the terms of the Compact of Self-Governance and Section II of the Funding Agreement between these parties. Such reobligated funds shall be in addition to the funding provided for in the Funding Agreement.

DATED THIS 30th DAY OF SEPTEMBER, 1993.

CHEROKEE NATION

By: /s/ Wilma P: Mankiller,
WILMA P. MANKILLER
Principal Chief

UNITED STATES OF AMERICA
By: /s/ [illegible]
Director, Indian Health Service
Department of Health and Human Services

ADDENDUM NO. 3 TO THE FY 1994
Annual Funding Agreement
Between
THE UNITED STATES OF AMERICA
and
THE CHEROKEE NATION

This Addendum No. 3 ("Addendum") to the FY 1994 Annual Funding Agreement ('FY 1994 A.F.A.") between the United States of America, acting through the Indian Health Service ("IHS"), Department of Health and Human Services ("DHHS"), and Cherokee Nation ("Nation") is entered into pursuant to the provisions of Title III of P.L. 93-638, as amended.

Recitals

WHEREAS, the IHS has apportioned FY 1994 Recurring Base Funding for the staffing for the newly-constructed and expanded Stilwell Ambulatory Outpatient Health Center, in the amount of $1,347,000; and

WHEREAS, the IHS has apportioned FY 1994 non-Recurring Funding to repair, improve and maintain Cherokee Nation Facilities, in the amount of $104,000; and

WHEREAS, the Nation desires to include the funding for these programs and projects under the provisions of its self-Governance Compact with IHS/DHHS executed on June 30,1993, by way of this Addendum to its FY 1994 A.F.A. with IHS/DHHS executed by these parties on said date in connection with said Compact,

NOW, THEREFORE, the parties agree that the FY 1994 A.F.A. should be amended as follows:

Purpose of Addendum

The purpose of this Addendum is to amend the FY 1994 A.F.A. by and between the Nation and the DHHS, pursuant to and in accordance with the Compact of Self Governance executed by said parties, by providing additional FY 1994

funding in connection with two projects for which funding was not provided under said Annual Funding Agreement. Except as expressly modified by this Addendum, the parties hereby agree that the provisions of the FY 1994 A.F.A. as modified or amended by previous Addenda, shall remain unchanged, in full force and effect, and shall apply to the additional funding and projects described in this Addendum.

Amendments to FY 1994 Annual Funding Agreement

The Nation and DHHS agree that the FY 1994 A.F.A. as amended by previous Addenda, should be, and hereby is, amended to provide additional funding in connection with the Stilwell Ambulatory Outpatient Health Center, as follows:

1. Section 2 of the FY 1994 A.F.A. as amended by previous Addenda, is hereby amended to increase the dollar amount of the "Hospital & Health Clinics" line item by the sum of $1,347,000, in order to provide additional FY 1994 recurring-base funding to the Nation for staffing the newly-constructed and expanded Stilwell Ambulatory Outpatient Health Center.
2. Section 2 of the FY 1994 A.F.A. as amended by previous Addenda, is hereby further amended to include the sum of $104,000, in order to provide FY 1994 non-recurring-base funding to the Nation for repair, improvement and maintenance of Cherokee Nation facilities as follows:

Routine Maint.: Benchstock/Serv. Cont/Equip. Replacement	$32,000.00
Local Projects and Training	$3,000.00
M&I Construction Contracts	$65,000.00
Substance Abuse Program	$4,000.00
Total	$104,000.00

The Nation and DHHS further stipulate and agree that the Secretary shall make the foregoing-described additional

amounts available to the Nation pursuant to Article IV, Section 4, of the Compact of Self-Governance.

Dated this 26th day of SEPTEMBER, 1994.

UNITED STATES OF AMERICA

By: [illegible]
Director, Indian Health Service
Dept. of Health and Human Services

CHEROKEE NATION

/s/: Wilma P. Mankiller
WILMA P. MANKILLER, Principal Chief

DEPARTMENT OF HEALTH & HUMAN SERVICES
[SEAL]
Date March 3, 1994
From OCA/DFM
Subject Additional Funds for Cherokee Nation Compact
TO James P. Dunnick, Jr., Director
Division of Resources Management
Office of Administration and Management
Parklawn Building, Room 5A-54
5600 Fishers Lane
Rockville, MD 20857

The Oklahoma Area was given FY-94 recurring funds for the staffing of the new facility at Stilwell, OK. The Stilwell Clinic will be included in the Cherokee Nation Self-Governance compact. We request the funds be reduced from the Oklahoma Area and added to the Cherokee Nation Compact. The funds are as follows:

Hospitals and Clinics	863,000.
Dental	229,000.
Mental Health	132,000.
Total Clinical Services	1,224,000.
Public Health Nursing	123,000.
Grand Total	1,347,000.

Also $104,000. of non-recurring 75x0391 Repair, Improvement and Maintenance funds have been identified for the Cherokee Nation compact. These funds also need to be reduced from the Oklahoma Area.

If additional information is required, please call Marian Mitchell at (405) 945-6850.

/s/ Denis D. West
DENIS D. WEST, Director
Division of Financial Management
Oklahoma City Area IHS

cc: REUBEN HOWARD
Acting Director, Self-Governance, Room 6-22

FISCAL YEAR 1995
ANNUAL FUNDING AGREEMENT
BETWEEN
THE UNITED STATES OF AMERICA
AND
CHEROKEE NATION

SECTION ONE
PREAMBLE

This Annual Funding Agreement (AFA) is executed and entered into by and between the Cherokee Nation and the United States of America pursuant to the Indian Self-Determination and Education Assistance Act P. L. 93-638 as amended by P.L. 100-472. This AFA is incorporated into and governed by the Compact of Self Governance entered into between the Cherokee Nation and the Secretary of the Department of Health and Human Services on October 1, 1993.

SECTION TWO
GENERAL BUDGET CATEGORIES

The Nation is authorized to plan, conduct, consolidate, administer and, subject to the terms of the Compact, redesign the services and reallocate funding identified within the following General Budget Categories as a consolidated tribal government budget:

		1995 Totals
1. Clinical Services		
Hospital & Health Clinics	9,058,178	
Dental Services	1,550,254	
Mental Health	1,237,648	
Alcohol & Substance Abuse	615,976	
Total Clinical Services (1),(2)		$12,462,056
2. Contract Health Services (1),(2),(3),(4),(5)		$2,034,257

3. Preventive Health Services		
Public Health Nursing	$867,089	
Health Education	$161,646	
Community Health Representatives	$1,477,980	
Total Preventive Health Services (1),(2)		$2,506,715
4. Contract Support Costs (1),(2)		$473,077
TOTAL STANDARD INDIAN HEALTH SERVICE PROGRAMS		$17,476,105

SECTION THREE
PROGRAM FORMULA FUNDING

Sanitation Facilities Support (6)	$590,071	
RPMS (7)	$263,399	
Equipment Replacement	$451,329	
Unmet Need (8)	$ 19,460	
Continuing Education (9)	$ 17,000	
M&I (10)	$ 85,325	
TOTAL PROGRAM FORMULA FUNDING (CENTRAL OFFICE)		$1,426,584

SECTION FOUR
CONGRESSIONALLY-EARMARKED FUNDING

The Nation is not authorized under this Annual Funding Agreement to redesign, shift or transfer any funding for the following services identified within the General Budget Categories which are subject to special restriction imposed by congressional directives:

Sanitation Facilities Construction (11)
Total Congressional Earmarked Funding (11) $_____

SECTION FIVE
TRIBAL SHARE OF OKLAHOMA CITY AREA AND HEADQUARTERS OFFICES

The Nation is authorized to accept the funding for services previously provided by the Oklahoma Area Indian Health Service. Additionally, the United States shall furnish funding

to the Cherokee Nation from Central Headquarters funds and the Cherokee Nation may reallocate, shift or transfer any such funding as a consolidated tribal government budget. The total amount set forth below represents a compromised figure for its Tribal Share. Although Cherokee Nation agrees to accept this amount as a share of the Oklahoma Area and Central Headquarters budgets, it does not agree that this amount represents its true share of said budgets.

Central Headquarters Tribal Share	$2,134,569
OKC Area Office Tribal Share	$ 500,000
Total Oklahoma City Area and Headquarters Tribal Share (12)	$2,634,569

SECTION SIX
INDIRECT COST FUNDING

The amount of funds allocated to the Nation under this Annual Funding Agreement for Indirect Cost Funding shall be established and paid based upon the Nation's approved Indirect Cost Agreement for 1995. The following amount assumes an agreed to rate of 14.5%.

Indirect Cost All Program Funds @ 14.5%	$3,122,909

SECTION SEVEN
SUMMARY OF FUNDING

The funding made available to Cherokee Nation under this AFA is summarized as follows:

Standard IHS Programs	$17,476,105
Program Formula Funding	$ 1,426,584
Congressionally Earmarked Funding	$
Tribal Shares-Area and Central HQ Offices	$ 2,634,569
Indirect Cost Funding	$ 3,122,909
Total FY 1995 Funding	$24,660,167

SECTION EIGHT
SERVICES NOT COVERED BY THIS AGREEMENT

The following services are not included within this Annual Funding Agreement:

Claremore and Hastings Hospitals—Inpatient Medical Services in Claremore and Hastings Service Units and associated Direct and Contract Health Services; outpatient clinics located in Claremore and Hastings hospitals; and the administrative support for all such services at the Oklahoma Area and Headquarters administrative levels.

Contracts retained under P.L. 93-638—Stilwell Equipment Acquisition Administrative, Sallisaw Construction, Stilwell Construction, Stilwell Equipment Acquisition Management. Buy-Indian contract for Regional Adolescent Treatment Center.

The Nation reserves the right to negotiate with the Secretary under the provisions of P.L. 93-638, as amended, to include such services in the Annual Funding Agreement at a later date.

SECTION NINE
ITEMS OF DISPUTE

Items and issues in dispute will be listed in and be a part of the Annual Funding Agreement. A decision on the disputed issue(s) will be made by the Secretary no later than 30 calendar days after the negotiation date. If the decision is in favor of the Nation, the funding will be added to the Annual Funding Agreement. The formal written decision will be filed and become a part of the Annual Funding Agreement.

SECTION TEN
ADJUSTMENTS DUE TO CONGRESSIONAL ACTIONS

The parties agree that adjustments may be made due to Congressional action. Upon enactment of relevant Appropriations Acts, the amount will be adjusted as necessary and the Nation notified of such actions. It is recognized there may be variances which may need to be renegotiated. Each party agrees to notify the other party as such variances are identified.

SECTION ELEVEN
PREVIOUS P.L. 93-638 CONTRACTS/GRANTS FUNDS

Under the terms of this agreement, funds remaining from previous P.L. 93-638 contract/grants, at the effective date of this agreement, are to be expended according to the terms of this compact and are not subject to the provisions of said contracts/grants except as expressly provided in this AFA or any amendment or addendum hereto.

SECTION TWELVE
PAYMENT

The parties agree that the Secretary shall fund this AFA in quarterly installments, except for specific line items where funding is made available on a reimbursable or other programmatic basis.

SECTION THIRTEEN
ENDNOTES

1. Fiscal Year 1995 increases for population growth, mandatories and contract support are not included in this AFA. Funding will be adjusted when the actual FY 95 appropriations become available. Funding hereunder shall also be increased by way of amendment(s) to this AFA whenever authorized by future congressional action.

2. Fiscal Year 1995 non-recurring funds are not included in this AFA and will be included herein by way of addendum when actual FY 1995 appropriations become available.

3. Fiscal Year 1995 Outpatient Contract Health Service Funding is now included in this AFA. Both parties agree that the Nation's 1995 share to be included in this AFA, and

subject to adjustment based upon actual appropriations, is $1,535,450.

4. The parties agree that Cherokee Nation will provide Contract Health Service resources only for eligible Indian people residing in the service areas of the Redbird Smith, Wilma P. Mankiller, Nowata, Salina and Delaware district health centers who have been referred by staff at said facilities to contract vendors for a higher level of ambulatory/diagnostic care. Further, the parties acknowledge that the contract health services funding provided for in this AFA represent funds which IHS has allocated to said facilities and not the W. W. Hastings or Claremore Service Units.

5. All requests and documentation for Contract Health Service Deferred Services resources will be sent directly to IHS Headquarters East for funding determination and will be included in this AFA by way of further addenda executed by the parties.

6. Cherokee Nation has calculated this figure to be $662,752. Therefore, the parties agree to review this figure in good faith to determine whether it was calculated correctly in accordance with the IHS's allocation formula.

7. RPMS funds include $97,701 in computer technical support and training. In the event the parties are unable to agree on a buy-back rate or arrangement within 60 days of execution hereof, this AFA may be modified to delete such support and training funds.

8. The Unmet Needs figure is an approximation only, and may be adjusted in FY 1995 in accordance with the Unmet Needs program formula.

9. This figure is computed at the rate of $200 per registered nurse, $600 per dentist and $1000 per physician.

10. In addition to the funds identified in this line item, the Nation shall be entitled to participate in Special Projects funding during FY 1995.

11. Public Law 86-121, Sanitation Facilities Construction funds, for regular, housing and special projects will be modified into the AFA by way of addendum when such funds become available.

12. The funds identified herein were calculated by IHS using the same residual and categorical line-item assumptions which IHS utilized in FY 1994. Provided, however, the amounts included in the AFA for the Nations Area Office and Central Headquarters tribal shares and Sanitation Facilities Support reflect a negotiated, compromised amount and the parties do not necessarily accept each other's methodologies used in arriving at the amounts to be provided by the Secretary hereunder. The IHS shall initially provide 90 percent of the negotiated amount for IHS Central Headquarters tribal share, and prior to the completion of the FY 1995 AFA the remaining 10% of such share shall be provided as resources become available resulting in a 100% funding of such negotiated tribal share in FY 1995. Further, the parties agree to review Headquarters residual resources and understand that the funding may change in FY 1996.

DATE THIS 30th DAY OF JUNE, 1994.

CHEROKEE NATION

/s/ [illegible]
Wilma P. Mankiller
Principal Chief

UNITED STATE OF AMERICA

/s/ [illegible]
Dr. Michael Trujillo
Director of Indian Health Service
Department of Health and Human Services

ADDENDUM NO. 3 TO THE FY 1995
ANNUAL FUNDING AGREEMENT
Between
THE UNITED STATES OF AMERICA
and
THE CHEROKEE NATION

This Addendum No. 3 ("Addendum") to the FY 1995 Annual Funding Agreement, as amended ("Amended FY 1995 AFA"), is entered into by and between the United States of America, acting through the Indian Health Service ("IHS"), Department of Health and Human Services ('DHHS"), and Cherokee Nation ("Nation"), pursuant to the provisions of 25 U.S.C. §450 *et seq*.

Recitals

WHEREAS, the parties have determined that certain line items in Sections Two, Three, and Five of the Amended FY 1995 AFA require adjustments in funding levels; and

WHEREAS, the parties have agreed that the said adjustments and additional finding should be reflected in this Addendum modifying the Amended FY 1995 AFA and that AFA, as amended herein, should be subject to the provisions of the Compact of Self-Governance executed by these parties on June 30th 1993.

NOW, THEREFORE, the parties agree as follows:

Purpose of Addendum

The purpose of the Addendum is to amend the Amended FY 1995 AFA, by adjusting the funding amounts resulting from mandatory increases for General Budget Categories; adjust Contract Health Services (Section Two, item 2 of the Amended FY 1995 AFA) and clarifying the respective responsibilities of the Nation and IHS in regard to Contract Health Service; and to provide additional non-recurring funding available to the Nation for Fiscal Year 1995 (FY '95). Except as expressly modified by this Addendum, the

parties hereby agree that the provisions of the Amended FY 1995 AFA shall remain unchanged, in full force and effect.

Amendments to Section Two of the
Amended FY 1995 AFA

Section two of the Amended FY 1995 AFA is hereby amended to adjust the funding amounts in the line items under the "General Budget Categories" set forth therein and provide funding for certain non-occuring programs, project and activities not identified in said AFA. Section Two is amended to read as follows:

Section Two
General Budget Categories

The Nation is authorized to plan, conduct, consolidate, administer and, subject to the terms of the Compact of Self-Governance, redesign the following programs, activities and services, and to reallocate and expend the funding identified within the General Budget Categories as a consolidated tribal government budget:

	STANDARD INDIAN HEALTH SERVICES	Original	Change	Revised
1	Clinical Services			
	Hospital and Clinics	9,058,178	113,493	9,171,670
	Dental Services	1,550,254	30,953	1,581,207
	Mental Health	1,237,648	17,152	1,254,800
	Alcohol & Substance Abuse	615,976	14,109	630,085
	Total Clinical Services	12,462,056	175,706	12,637,762
2	Contract Health Services (1)	2,034,257	(33,655)	2,000,602
3	Preventive Health Services			
	Public Health Nursing	867,089	9,904	876,993
	Health Education	161,646	1,654	163,300
	Community Health Representatives	1,477,980	33,090	1,511,070
	Total Preventive Health Services	2,506,715	44,648	2,551,363

4	Contract Support Costs	473,077		473,077
	Total Standard Indian Health Service Programs	17,476,105	186,699	17,662,804

NON-RECURRING RESOURCES:

CHS Medical Deferred	17,585
CHS Dental Deferred	1,700
CHS Non-Recurring	7,333
HIV/AIDS	1,875
Diabetes Camp	3,000
Continuing Education Dental	16,866
Continuing Education Nursing (HQ)	3,400
Dental Equipment Replacement	6,908
Total Non-recurring Funds	58,667

Amendment to Section Three of the Amended FY 1995 AFA

The line item for Sanitation Facilities Support is hereby amended from $590,071 to $591,317, an increase of $1,246. The line item for M&I is hereby amended from $85,325 to $80,000, a decrease of $5,325. The new total for Section Three, Program Formula Funding, reflecting the adjustments, should read as follows:

Total Program Formula Funding (CENTRAL OFFICE) $1,422,505

Amendments to Section Five of the Amended FY 1995 AFA

The line item for the Nation's compacted tribal share of the Oklahoma City Area Office is hereby amended from $500,000 to $484,575, a decrease of $15,425. This decrease is the result of administrative and conference reductions. The new total for Section Five, Tribal Share of Oklahoma City Area and Headquarters Offices, reflecting the adjustment, should read as follows:

Total Oklahoma City and Headquarters Tribal Share(12) $2,619,144

Additional Amendments to the Amended FY 1995 AFA

1. Contract health Provisions

   As a result of the $125,000 decrease in Contract Health Services funding associated with emergency room ,visits (see Endnote 1). The parties to this Addendum further agree as follows:

   a) Cherokee Nation will serve all CHS eligible out-patients in the Nation's service area.

   b) IHS will provide emergency services for both IHS and Nation's service area.

   c) IHS will assist in on-site training of Nation's CHS staff and coordinate with providers to ensure appropriate referrals between the two systems.

   d) Both parties will keep patient care as top priority in this partnership, maintain open lines of communication between staff, and focus on timely actions for referrals.

2. Cherokee Nation's Share of Fiscal Intermediary

   The Nation's share of the Fiscal Intermediary Contract has been identified for FY '95 at $72,165 and is hereby added by this amendment.

3. Retention/Bonus Pay

   The Nation's cost for payment of retention/bonus pay for FY '95 is $165,000 and is hereby reimbursed by this amendment.

ENDNOTES

1. The funding identified in the line item "Contract Health Services" (see Section 2) was determined as follows: FY 1995 "mandatories" and administrative procurement and conference reductions resulted in a net increase over the original amount of $2,034,257 by $50,303, or $2,084,560.

This figure was reduced by $125,000 down to $1,959,560, reflecting a compromise reduction for certain emergency room visits for which the Nation did not compact with IHS. The figure of $1,959,560 was further adjusted by an increase of $41,042, the sum of additional Contract Health Services funding ($29,995) plus unmet need funding ($11,047), resulting in a final funding level of $2,000,602.

Entered into on this ___ day of _____ 1995.

Cherokee Nation	United States of America
/s/ Joe Byrd	/s/ _____
HONORABLE JOE BYRD	Dr. Michael E. Trujillo
Principal Chief	Director
	Indian Health Service
	Department of Health and Human Services

FISCAL YEAR 1996
ANNUAL FUNDING AGREEMENT
BETWEEN
THE UNITED STATES OF AMERICA
AND
CHEROKEE NATION

SECTION ONE
PREAMBLE

This Annual Funding Agreement (AFA) is executed and entered into by and between the Cherokee Nation (the Nation) and the United States of America pursuant to the Indian Self-Determination and Education Assistance Act P.L. 93-638, as amended. This AFA is incorporated into and governed by the Compact of Self Governance entered into between the Nation and the Secretary of the Department of Health and Human Services on October 1, 1993.

SECTION TWO
GENERAL BUDGET CATEGORIES

The Nation is authorized to plan, conduct, consolidate, administer, and, subject to the terms of the Compact, redesign the following programs, activities and services, and to reallocate and expend the funding identified within the following General Budget Categories as a consolidated tribal government budget:

1. Clinical Services:	1996 Totals
Hospital & Health Clinics	9,171,670
Dental Services	1,581,207
Mental Health	1,254,800
Alcohol & Substance Abuse	630,085
Total Clinical Services (l), (2), (3), (4)	$12,637,762
2. Contract Health Services (l), (2), (5), (6), (7)	$ 1,959,560

3. Preventive Health Services:	
Public Health Nursing	$ 876,993
Health Education	$ 163,300
Community Health Representatives	$ 1,511,070
Total Preventive Health Services (1), (2), (3), (4)	$ 2,551,363
4. Contract Support Costs (1), (2)	$ 477,885
Total Standard Indian Health Service Programs	$17,626,570

SECTION THREE
PROGRAM FORMULA FUNDING

The following services, programs or activities shall be funded as "Program Formula" funding:

Environmental Health Support	$ 757,969
Management Initiative Fund (Hdqtrs) (17)	$
RPMS(8),(9)	$
Unmet Need (8),(10)	$
Continuing Education(8),(11)	$
M & I (8),(12)	$
Total Program Formula Funding	$ 757,969

SECTION FOUR
CONGRESSIONALLY—EARMARKED FUNDING

Funding for the following programs, activities or services shall be furnished to the Nation and expended in accordance with the specific purposes expressly stated in federal legislation:

Sanitation Facilities Construction (13)	$_____
Total Congressional Earmarked Funding (13)	$

SECTION FIVE
TRIBAL SHARE OF OKLAHOMA CITY AREA AND HEADQUARTERS OFFICES

Subject to the provision of Section Twelve of this AFA, the United States shall make available to the Nation its "tribal shares" of the IHS Oklahoma City Area Office (OCAO) and the IHS Central Headquarters budgets in the amounts identified in this Section below. The Nation is authorized to expend, reallocate, shift or transfer any or all of such funding and administer same as a consolidated tribal government budget. The finding identified below as the Nation's tribal share of the OCAO and Headquarters budgets represents a compromise between the Nation and the United States in light of conflicting views as to the amounts to be made available for tribal share allocation, the percentages of the Nation's share compacted, and the formulas used to allocate tribal share funding among the tribes. By accepting such finding, the Nation is not agreeing that it is an accurate allocation of its true tribal share of the OCAO or Headquarters budgets. The parties hereby agree to review the OCAO and Headquarters determination of their respective residual resources. The parties further agree that some resources identified as residual, or otherwise unavailable for tribal share distribution, may become available for such distribution during FY 1996, in which case the Nation's share of such additional funding shall be identified in an addendum hereto and made available to the Nation.

Central Headquarters Tribal Share (15),(16)	$1,624,707
OEHE Headquarters Tribal Share (14),(15)	$
OKC Area Office Tribal Share (15),(16)	$ 659,558
Total Oklahoma City Area and Headquarters Tribal Share	$2,284,265

SECTION SIX
INDIRECT COST FUNDING

The amount of finds allocated to the Nation under this Annual Funding Agreement for Indirect Cost Funding shall be established and paid based upon the Nation's approved Indirect Cost Agreement for 1996. The following amount assumes an agreed rate of 19.5%, which shall also apply to additional funding identified in any future addendum(s) to this AFA.

Indirect Cost All Program Funds @ 19.5%	$4,030,417

SECTION SEVEN
SUMMARY OF FUNDING

The funding made available to the Nation under this AFA is summarized as follows:

Standard IHS Programs	$17,626,570
Program Formula Funding	$ 757,969
Congressionally Earmarked Funding	$
Tribal Shares—OCAO and Central HQ Offices	$ 2,284,265
Indirect Cost Funding	$ 4,030,417
Total FY 1996 Funding (18)	$24,699,221

SECTION EIGHT
SERVICES NOT COVERED BY THIS AGREEMENT

The following services are not included within this Annual Funding Agreement:

Claremore and Hastings Hospitals—Inpatient Medical Services in Claremore and Hastings Service Units and associated Direct and Contract Health Services; outpatient clinics located in Claremore and Hastings hospitals; and the administrative support for all such services at the OCAO and Headquarters administrative levels.

Contracts retained under P.L. 93-638—Stilwell Equipment Acquisition Administrative; Sallisaw Construction;

Stilwell Construction; Stilwell Equipment Acquisition Management; and the Buy-Indian contract for Regional Adolescent Treatment Center. The terms of these contracts shall govern these programs, services and activities.

The Nation reserves the right to include such services and the funding therefor in this AFA, by way of amendment, or in future AFA's.

SECTION NINE
ITEMS OF DISPUTE

Any items or issues remaining in dispute under this AFA as of the execution date hereof shall be identified on an attachment to this AFA labeled "Items or Issues in Dispute." The disputed items/issues shall be transmitted to the Secretary immediately. The parties may brief the issues if they choose, but in any event a decision shall be made by the Secretary in writing no later than 30 calendar days after the execution date set forth below. If the decision grants the specific relief requested by the Nation, or if the dispute is settled between the parties, the funding shall be modified into this AFA by way of the Secretary's written decision which shall become a part of the AFA.

SECTION TEN
ADJUSTMENTS DUE TO CONGRESSIONAL ACTIONS

The parties agree that adjustments may be appropriate due to unanticipated Congressional action. Upon enactment of relevant Appropriations Acts, the adjustments may be negotiated as necessary; provided, however, the Nation shall be notified and consulted in advance of any proposed adjustments. It is recognized by the parties that circumstances may arise where funding variances or other changes or modifications may be needed, and the parties shall negotiate same in good faith.

Provided, however, this AFA shall not modified to decrease or delay any funding except pursuant to mutual agreement of the parties.

SECTION ELEVEN
PREVIOUS P.L. 93-638 CONTRACTS / GRANTS FUNDS

Any funds heretofore made available to the Nation under P.L. 93-638 contracts or grants which remain unexpended as of the effective date hereof shall be expended in accordance with the appropriate provisions of this AFA. Any such funds, and the corresponding services or activities, shall not be subject to the provisions of said contracts or grants except as provided herein or in any amendment hereto.

SECTION TWELVE
PAYMENT

The parties agree that IHS will request apportionment of 100% of total FY96 AFA funding in the first quarter. Upon receipt of apportioned funds the IHS will within 21 days process and make available to the Cherokee Nation the apportioned amount.

SECTION THIRTEEN
BASELINE MEASURES

In accordance with the Nation's Self-Governance Compact, the Nation agrees to submit semi-annual and annual Self-Governance Baseline Measures reports to the Secretary. The Nation and IHS are presently jointly involved in the development of the format for the FY-96 Baseline Report and agree that when finalized the baseline measures for FY-96 will be included as an addendum to the FY-96 AFA.

SECTION FOURTEEN
EFFECTIVE DATE

This AFA shall be effective on October 1, 1995, and this AFA, and any amendments hereto, shall remain in effect throughout the Nation's 1996 fiscal year.

SECTION FIFTEEN
MISCELLANEOUS PROVISIONS

1. The Nation shall have the right to participate in the development of "Budget Enhancements" for inclusion into the Indian Health Service's proposed budget.
2. The OCAO agrees to provide the Nation with copies of all of the OCAO's allowance documents when they are received at the OCAO.
3. The Nation shall have the right to share in any year-end resources made available to the OCAO or otherwise distributed by Headquarters.
4. The IHS is reviewing issues relating to transferring property to the self-governance tribes under Title III funding agreements. The IHS will resolve these issues during the 90-day review period following the execution hereof. Any transfers shall be made by way of addendum or other appropriate agreement between the parties.

SECTION SIXTEEN
ENDNOTES

1. Fiscal Year 1996 funding increases for population growth, mandatories, and contract support are not included in this AFA, due to the lack of required information. Such funding shall be adjusted and modified into this AFA when the actual FY 1996 appropriations become available, and the Nation's full share of such funding shall be paid. Funding hereunder shall also be increased by way of amendment(s) to this AFA whenever authorized by future

congressional action. The parties agree that any such funding which may be identified and made available for distribution to the Nation shall be transferred to the Nation without formal execution of an addendum or other modification document. The Nation shall be notified in advance of such transfer of funds and informed of the source and/or purpose of such funding.

2. Fiscal Year 1996 non-recurring funds are not included in this AFA, but shall be included herein by way of addendum when actual FY 1996 appropriations become available.

3. IPA/MOA resources are included in this AFA. On or before January 31, 1996, the Nation shall receive in lump sum the balance of unobligated IPA/MOA resources, except that 30 days estimated IPA/MOA costs may be withheld by the IHS for prospective payment of these costs. The Nation will be invoiced monthly for actual costs with periodic reconciliations of payments and costs, and with a final reconciliation and disbursement of finds occurring before the end of the fiscal year. No later than January 31, 1996, an estimated 30-day resource requirement for IPA/MOA salaries and benefits to be withheld will be agreed upon for FY 1996.

4. Regional Supply Center (Ada) resources are included in this AFA. The Secretary or Director of IHS is determining procedures whereby the Nation would purchase drugs and supplies from IHS at the RSSC with its allocation of RSSC resources. Under such procedures, RSSC will invoice the Nation monthly for its purchases of drugs and supplies. After the Nation has completed the appropriate receiving reports for internal control, the Nation will notify the Office of Self-Governance in writing, on a quarterly basis, authorizing transfer of funding from the AFA to the RSSC. These procedures will be implemented when they are approved by the Secretary or his designee.

5. Fiscal Year 1996 Outpatient Contract Health Service Funding is included in this AFA. The parties agree that the Nation's 1996 share to be included in this AFA, subject to adjustment based upon actual appropriations, is $2,084,560.

6. The parties agree that the Nation will provide Contract Health Service resources only for eligible Indian people residing in the service areas of Redbird Smith, Wilma P. Mankiller, Nowata, Salina, and Jay-Sam Hider health centers who have been referred by staff at said facilities to contract vendors for a higher level of ambulatory/ diagnostic care. Further, the parties acknowledge that the contract health services finding provided for in this AFA represents finds which IHS has specifically allocated to said health centers and not to the W.W. Hastings or Claremore Service Units.

7. All requests and documentation for Contract Health Service Deferred Services resources will be sent directly to IHS Headquarters East for finding determination. Said resources shall be identified and included in this AFA by way of further addendum executed by the parties.

8. The funding for this Program Formula line item had not been identified as of the date of execution of this AFA. Prior to determining the Nation's allocation of this line item, the parties agree to meet and discuss the methodology and calculation of such allocation. When an amount has been agreed to in an addendum hereto, the funds shall be included in the Nation's FY 1996 finding. By identifying and accepting this finding as "Program Formula," the Nation shall not be conceding that the formula used was appropriate or that such funding should not be allocated as tribal shares.

9. RPMS finds may be expended on computer technical support and training conducted by IHS or other parties.

10. The Unmet Needs figure is an approximation only, and may be adjusted in FY 1996 in accordance with the Unmet Needs program formula. Said adjustments shall be made by way of an addendum executed by the parties.

11. This figure is computed at the rate of $200 per registered nurse, $600 per dentist, and $1,000 per physician.

12. In addition to the funds identified in this line item, the Nation shall be entitled to participation in any Special Projects finding during FY 1996.

13. Public Law 86-121, Sanitation Facilities Construction Funds for the Cherokee Service Area for regular, housing and special projects shall be modified into the AFA by way of a letter agreement when such funds become available, and shall be expended in accordance with the provisions of said letter agreement and the attached project scope documents. Said letter agreement shall be signed by the Nation's Principal Chief and the IHS Official designated by the Director of IHS. The total amount of the project money identified in the letter agreement shall be added to this section of the AFA and shall be made available to the Cherokee Nation within 60 days after the IHS Area Office receives the completed project documents.

14. Cherokee Nation's allocation of O.E.H.E. Support Headquarters' funds for FY 94 and FY 95 was calculated on the basis of user population, yielding for FY 95 the sum of $465,000. The Nation has proposed that, to accommodate a transition from a user population formula to the workload formula, the Nation's FY 1996 allocation of this fund is an amount equal to 80% of the FY 1995 funding, and that the allocation for each succeeding fiscal year thereafter through FY 1999 shall be 80% of the previous fiscal year's funding; provided, that if the workload formula or other formula approved by the Director would

yield a larger allocation for any of the fiscal years during the transition period, the larger allocation would apply for any such year. Accordingly, the estimated allocations for FY's 1996 through 1999 are $372,000, $297,600, $238,000, and $190,400, respectively, unless for any such fiscal year the workload or other approved formula would yield a greater sum. After FY 1999, the workload or other formula approved by the Director shall be used to determine Cherokee Nation's allocation. The parties agree that the funding for this line item shall remain open to allow IHS to review the proposal and to meet no later than July 31 to resolve the FY 1996 O.E.H.E. support funding. At that time the parties shall execute an addendum to the AFA to provide for this funding. The funding described herein represents a negotiated settlement; the Nation does not concede that the workload formula is an appropriate method for allocating these funds.

15. The amounts included in the AFA for the Nation's OCAO and Headquarters tribal shares and for Sanitation Facilities Support reflect a negotiated, compromised amount and the parties do not necessarily accept each other's methodologies used in arriving at the amounts to be provided by the Secretary hereunder. Specifically the Nation disagrees with the decision of the IHS to utilize a "Tribal Size Adjustment" formula instead of historically applied User Population formula for resource allocation. Further, the parties agree to review OCAO and Headquarters residual resources and understand that, should the residual amount be decreased, this AFA shall be modified to include the Nation's share of additional funding made available by the decrease in residual.

16. The funding identified in these line items represents the Nation's allocation of its tribal shares of the OCAO and Headquarters, computed with a "percent compacted" figure based on the Nation's FY 1994 base funding. The parties have agreed that these amounts will be revised to

reflect a "percent compacted" based on the Nation's FY 1995 base funding (including full- year funding of the Stilwell health center). The OCAO has agreed to provide the Nation's revised percent compacted by sub-activity reflecting the use of FY-1995 funding levels, for the purposes of recalculating the funding of the Nation's tribal shares of the OCAO and Headquarters. The parties' agree that as soon as the OCAO has recalculated the Nation's percent compacted, this AFA shall be amended accordingly.

17. The parties shall negotiate the Nation's percentage of the Management Initiative Fund of the Headquarters' budget based on the Tribal Size Adjustment formula adopted by the Director of Indian Health Service. The negotiations shall be concluded prior to August 30, 1995, and the Nation's Tribal Size Adjustment share of the amount to be distributed shall be added to the Nation's tribal share of Headquarters' funds (Section Five of this AFA) by way of an addendum hereto. Any balance in the fund as of September 1, 1996, shall be paid to the Nation on the basis of the Tribal Size Adjustment formula.

18. See endnotes applicable to each of the funding categories identified in this Section.

IHS Footnote dated June 30, 1995

This agreement is contingent upon an internal review, during the 90-day review period, for consistency with Federal law and accuracy of calculations. Issues identified will be shared with the tribe(s) for further negotiations. Therefore these issues should be considered unresolved, e.g., funding of HQ tribal shares, title I provisions, contract support costs, and MOA/IPA agreements, etc. The Director in agreeing to sign the AFA will identify the issues and continue to negotiate with the tribe for resolution within the 90-day review period.

Dated this 30th day of June, 1995.

CHEROKEE NATION

By: /s/ John Ketcher
WILMA P. MANKILLER
Principal Chief

UNITED STATES OF AMERICA

By: /s/ Michael Trujillo
DR. MICHAEL TRUJILLO
Director of Indian Health Service
Department of Health and Human Services

[See JA Vol. II, PART 2 for Attachment #2, AFA Detail Report]

CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465-0948
(918) 456-0671

Wilma P. Mankiller
Principal Chief

John A. Ketcher
Deputy Chief

June 29, 1995

Mr. Reuben Howard, Acting Director
Office of Self-Governance
Indian Health Services
Parklawn Building, Room 5A-37
5600 Fisher Lane
Rockville, Maryland 20852

Dear Mr. Howard

Enclosed herewith are three copies of the final negotiated Self-Governance Annual Funding Agreement for Fiscal Year 1996, which resulted from final negotiations held in Rockville on June 8, 9, & 23, 1995. The Cherokee Nation anticipates the recommendations of your respective offices for the Director to approve the proposed Funding Agreement. Please transmit the documents as appropriate and advise if further actions are needed by the Cherokee Nation to ensure the executed agreement is transmitted to the Congressional Committees by July 1, 1995.

Sincerely,

/s/ Charles L. Head
CHARLES L. HEAD
Self-Governance Coordinator

Enclosures

ADDENDUM NO. 1 TO FY 1996 ANNUAL FUNDING AGREEMENT BETWEEN THE UNITED STATES of AMERICA AND CHEROKEE NATION

This Addendum to the FY 1996 Annual Funding Agreement ("FY 1996 AFA") by and between Cherokee Nation ("Nation") and the United States of America, acting through the Indian Health Service ("IHS"), Department of Health and Human Services, is entered into pursuant to the provisions of 25 U.S.C. § 450 *et seq.*

Recitals

WHEREAS, at the time of execution of the FY 1996 AFA, certain issues on funding and related matters had not been resolved and, by agreement of the parties, were left open for further negotiation during the 90-day review period; and

WEREAS, some of the aforesaid issues have been resolved, and the parties have agreed to modify the FY 1996 AFA to incorporate the parties' agreement with respect to such issues.

NOW, THEREFORE, the parties agree as follows:

Purpose of Addendum

The purpose of this addendum is to mo FY 1996 AFA to reflect the agreements of the parties with respect to some of the unresolved issues and funding levels remaining as of the execution date of said AFA, as more specifically set forth hereinbelow. Except as expressly modified by this Addendum, the parties agree that the provisions of the FY 1996 AFA shall remain unchanged, in full force and effect.

Amendments to Section Two
of the FY 1996 AFA

Line item number four (4) under Section Two of the FY 1996 AFA, "Contract Support Costs," is hereby amended to read "Direct Contract Support Cost". The amount identified in the FY 1996 AFA, $477,885, is reduced by $4,808 for a new funding level of $473,077. This adjustment is a result of the administrative and conference reduction for FY 1995 that reduced the 1996 base.

4. Direct Contract Support Costs (1),(2)	$473,077

The new total for Section Two, General Budget Categories, reflecting the adjustment noted above, should read as follows:

TOTAL STANDARD INDIAN HEALTH SERVICE PROGRAMS	$17,621,762

Except as noted above, Section Two shall otherwise remain unchanged.

Amendments to Section Three
of the FY 1996 AFA

Section Three of the FY 1996 AFA is hereby amended to add a line item omitted from the FY 1996 AFA, i.e., "Permanent Change of Station." As of the date of execution of this Addendum, the funding for this additional line item has not been determined, and the parties agree to execute an appropriate modification agreement to provide for such funding once the amount been determined. The tabulation in this section shall now read as follows:

Environmental Health Support	$757,969
Management Initiative Fund (HQ)(17)	$
Unmet Need (8), (11)	$
Continuing Education (8), (11)	$
M&I (8), (12)	$
Permanent Change of Station (8)	$_____
Total Program Formula Funding	$757,969

Amendments to Section Five
of the FY 1996 AFA

The line item in Section Five of the FY 1996 AFA designated "Central Headquarters Tribal Share" is hereby amended to reflect an increase of $293,435 up to $1,918,142. The line item in said Section designated "OEHE Headquarters Tribal Share" is hereby amended to reflect funding in the amount of $400,000. One other line item, OCAO RPMS, is added to read as follows:

IHS/HQ Tribal Share (15),(16)	$1,918,142
OEHE Headquarters Tribal Share (14),(15)	$ 400,000
OCAO Tribal Share (15),(16)	$ 755,217
OCAO - RPMS(9)	$ (55,067)
Total OCAO and HQ Tribal Share:	$3,018,292

Amendments to Section Seven
of the FY 1996 AFA

Section Seven of the FY 1996 AFA is amended and replaced in its entirety to read as follows:

The funding made available to the Nation under this AFA is summarized as follows:

Standard IHS Programs	$17,621,762
Program Formula Funding	$ 757,969
Congressionally Earmarked Funding	$
IHS HQ Tribal Share	$ 2,318,142
OCAO Tribal Share (minus RPMS)	$ 700,150
Indirect Cost Funding	$ 4,172,614
Total FY 1996 Funding (18)	$25,570,637

Amendments to Section Twelve
of the FY 1996 AFA

Section Twelve of the FY 1996 AFA is amended and replaced in its entirety to read as follows:

The parties agree that IHS will make 100% of the service base funds available within 30 days of IHS apportionment. One hundred percent of the tribal shares for Central Head-

quarters and Area Office will be paid as follows; Seventy percent will be paid within 30 days of apportionment and the remaining 30% on or before July 1, 1996.

Amendments to Section Sixteen
of the FY 1996 AFA

Endnote No. 3 relating to MOA/IPA resources is hereby modified by adding to the end of the first sentence of said endnote: "and are estimated to be $848,536."

Endnote No. 4 relating to Regional Supply Services Center (RSSC-Ada) resources is hereby amended and replaced to read in full as follows :

> The Nation's allocation of the Regional Supply Service Center resources are estimated to be $1,500,000 (subject to quarterly reconciliation and adjustment), and the parties agree that these resources shall remain with IHS Headquarters, unless the Secretary or designee determines procedures whereby the Nation might purchase drugs and supplies from the IHS at the RSSC utilizing the Nation's allocation of RSSC resources. Contingent upon Secretarial approval of such procedures, the parties agree that the balance of the Nation's RSSC resources will be transferred to the Nation, and RSSC will invoice the Nation monthly for purchases of drugs and supplies. Pending such approval, however, the funds will remain with IHS as stated above; after the Nation has completed the appropriate receiving reports for internal control, the Nation will notify the Office of Self-Governance in writing, on a quarterly basis, authorizing transfer of funding from the AFA to the RSSC. The Nation reserves the right to negotiate a future modification agreement to provide for a transfer of some or all of such resources for purchasing drugs and supplies from third-party suppliers.

Endnote No. 6 relating to Contract Health Service resources is hereby modified by adding the following sentence after the last sentence in said Endnote: "The parties further agree that this endnote is not intended to change the eligibility criteria for Contract Health Services."

Endnote No. 7 relating to Contract Health Service resources is hereby amended and replaced to read in full as follows:

> All requests and documentation for Contract Health Service Deferred Services resources will be sent to IHS Headquarters East through the OCAO for funding determination. Said resources shall be identified and included in this AFA by way of further addendum executed by the parties.

Endnote No. 8 relating to certain Program Formula Funding line items is hereby amended and replaced in its entirety to read as follows:

> The funding for this Program Formula line item had not been identified as of the date of execution of this AFA. Prior to determining the Nation's allocation of this line item, the parties agree to meet and discuss the methodology and calculation of such allocation. When an amount has been agreed to in an addendum hereto, the funds shall be included in the Nation's FY 1996 funding. Provided, however, funding for continuing education and permanent change of station will be distributed from IHS HQ to the OCAO and from there allocated to the Nation pursuant to the said methodology. Funding for all other HQ program formula line items shall be distributed directly to the Nation from IHS HQ in accordance with said methodologies. By identifying and accepting this finding as "Program Formula," the Nation shall not be conceding that the formula used was appropriate or that such funding should not be allocated as tribal shares.

Endnote No. 9 relating to RPMS resources, is hereby amended and replaced in its entirety to read as follows:

> The Nation agrees to not compact its share of OCAO RPMS budget line item under the FY 1996 AFA. Presently this amount has been identified at $55,067. The Nation and OCAO have met and concluded this finding will remain with the OCAO in exchange for continued information technology support in accordance with Attachment 'A'. With respect to IHS Headquarters, the Nation shall receive its allocation of IHS Headquarters RPMS equipment fund, OIRM Headquarters East and OIRM Headquarters West funding in accordance with Section 12 hereof; provided, however, the parties agree that the Nation and United States may amend this AFA at a later date to provide identified products and services agreed upon with the Office of information Resources Manangement and the Office of Health Programs Research and Development.

Endnote No. 14 of the FY 1996 AFA, relating to Headquarters OEHE Support funding is hereby amended and replaced in its entirety to read as follows:

> The parties hereto have agreed to a compromise figure of $400,000 as the Nation's FY 1996 allocation of OEHE Support (Headquarters). However, the funding described herein represents a negotiated settlement; the Nation does not concede that the workload or any formula other than a user-population based allocation is appropriate for allocating these funds.

Endnote No. 16 of the FY 1996 AFA is hereby amended and replaced in its entirety to read as follows:

> The parties have agreed to the Nation's "percent compacted" based on the Nation's FY 1995 base finding (including full-year funding of the Stilwell Health Center, which resulted in the $297,495 increase in the Nation's Tribal Share of IHS Headquarters Office. The new "percent compacted" has been used to determine the

> Nation's FY 1996 Tribal Share allocation of IHS HQ, and said "percent compacted" figure will be used to recompute the Nation's FY 1996 Tribal Share allocation of the OCAO once the OCAO residual has been determined. At that time, the parties agree to execute an appropriate modification agreement to adjust the Nation's FY 1996 Tribal Share allocation of the OCAO.

Dated this ____Day of _____, 1995.

CHEROKEE NATION

/s/ Honorable Joe Byrd
HONORABLE JOE BYRD
Principal Chief

UNITED STATES OF AMERICA

Dr. Michael Trujillo
Director of Indian Health Service

Department of Health and Human Services

THE UNITED STATES DEPARTMENT OF THE
INTERIOR OFFICE OF HEARING AND APPEALS
INTERIOR BOARD OF CONTRACT APPEALS

IBCA 3877-3879/98

APPEAL OF CHEROKEE NATION OF OKLAHOMA,
Contractor-Appellant,

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
(INDIAN HEALTH SERVICE)
Appellee.

DECLARATION OF CARL L. FITZPATRICK

I, Carl L. Fitzpatrick, declare as follows:

1. I have been the Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service (IHS) for four years.

2. The Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service is responsible for formulating and executing the IHS budget. I have personal knowledge of the manner in which contract support costs are paid to the tribes/tribal organizations.

3. In the fiscal year 1994 appropriations for the IHS, Congress appropriated $136,686,000.00 for contract support costs, including $7,500,000.00 that was earmarked for the Indian Self-Determination Fund (ISD), to be available until expended, for contract support costs for initial or expanded tribal contracts with the IHS under the Indian Self-Determination Act.

4. In the fiscal year 1995 appropriations for the IHS, Congress appropriated $145,460,000.00 for contract support costs, including $7,500,000.00 that was earmarked for the Indian Self-Determination Act.

5. In the fiscal year 1996 appropriations for the IHS, Congress appropriated $153,040,000.00 for contract support costs, including $7,500,000.00 that was earmarked for the Indian Self-Determination Fund (ISD), to be available until expended, for contract support costs for initial or expanded tribal contracts with the IHS under the Indian Self-Determination Act.

6. For the fiscal year 1994 the appropriation for contract support costs has been distributed, and no contract support funds remain for that fiscal year.

7. For the fiscal year 1995 the appropriation for contract support costs has been distributed, and no contract support funds remain for that fiscal year.

8. For the fiscal year 1996 the appropriation for contract support costs has been distributed, and no contract support funds remain for that fiscal year.

The foregoing is true and accurate to the best of my knowledge, information, and belief.

Executed this 18 day of December, 1998 in Rockville, Maryland.

/s/ Carl L. Fitzpatrick
CARL L. FITZPATRICK

INTERIOR BOARD OF CONTRACT APPEALS

APPEAL OF CHEROKEE NATION OF OKLAHOMA,
Contractor-Appellant,

vs.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
(INDIAN HEALTH SERVICE)
Appellee.

DECLARATION OF DANIEL J. CESARI

I, Daniel J. Cesari, hereby declare as follows:

1. I have served in the capacity of Deputy Director, Division of Financial Management, at the Headquarters of the Indian Health Service (IHS) since 1995. I am primarily responsible for financial policy and the budget execution function in IHS and, in the absence of the Director, Division of Financial Management, IHS, the operation of the IHS financial system (budget, accounting, planning, etc.)

2. Since fiscal year (FY) 1995, the IHS has paid out contract support costs (CSC) for new and expanded contracts/compacts to Indian tribes and tribal organizations on a first come - first served basis. Because the amount of funds Congress appropriated for CSC for new and expanded contracts/compacts for FYs 1995, 1996, and 1997 was limited to $7.5 million per year, the IHS did not have the funds available to fully pay each and every tribe who requested CSC during those years. To fully fund all of the CSC requests nationwide, the IHS would have to use monies from other budget activities within the Services Appropriations that fund the recurring operations of various IHS Area offices and Service Units.

3. In FY 1996, the amount of new CSC requests exceeded the CSC appropriation of $7.5 million by $29.2 million. The

IHS policy for CSC is contained in Indian Health Service Circular No. 96-04, April 12, 1996. IHS issued this policy through an extensive and active consultation process with various tribes and tribal organizations throughout the country. In essence, once a tribe's request is approved to assume the operations of a program, function, service or activity (PFSA), they are entitled to CSC subject to the availability of funds. If funds are not available in the appropriation, the tribal CSC request is put on a list, known as the Indian Self-Determination (ISD) Queue. When funds are appropriated by Congress, the CSC request is processed and the tribe is paid its CSC, where it then becomes a part of the tribe's recurring base in future years.

4. The $29.2 million on the ISD Queue as of December 31, 1996, is the total amount of CSC funding that IHS is required to pay to tribes for contracts/compacts for PFSA that they (the tribes) have assumed. If the IHS were forced to pay the $29.2 million to these contracting/compacting tribes, IHS would, of necessity, have to spread the reduction among the recurring base funding of the Area offices and Service Units in IHS. This will result in the Area offices and Service Units having less funds for the provision of a full range of medical, dental, and mental health services to Indian people whose programs are being operated under the auspices of Federal operations.

5. Attached as Exhibit 1 is a table demonstrating how the IHS will have to allocate from its Services Appropriation to fully fund all of the nationwide CSC requests for FY 1996. The table is broken down by the twelve Area offices of IHS, including Headquarters, and demonstrates how and in what amounts the money Congress appropriated for the IHS would have been distributed had all CSC requests been fully funded nationwide for FY 1996. The number columns (1-13) at the top of the table represent the twelve Areas of the IHS, while the letters (A-U) on the left side of the table show the meth-

odology of how funds will be allocated. The conclusions drawn are based on my review of the Areas recurring base allocations and the requirement that if a reduction were to occur, the burden of the reduction would be shared equally among all IHS Areas, including Headquarters.

6. Block A 13 of the Table indicates that the total amount of the IHS Services Appropriation available for distribution to all Area offices and Services Units is $1,375,245,000. This amount is calculated as follows:

Appropriation	$1,747,842,000
Earmarks:	
ISD Fund	7,500,000
Contract Health Care	350,564,000
Catastrophic Care	12,000,000
Rescission	2,533,000
Net Appropriation	$1,375,245,000

This amount ($1,375,245,000) is distributed to the Area Offices as a recurring base amount for the operation of the Area Office and Service Units within the Area. The recurring allocation is developed historically and is adjusted upward every year for mandatory increases (pay raise, inflation, etc.) and for decreases specified in the Appropriation (rescissions, program decreases, etc.). The recurring base provides for continuity of services so the Areas and Service Units have a relative stable base of funding. If the Areas and Service Units did not have a recurring base allocation from year to year, they would be subject to significant fluctuations in funding and could not operate the medical program with any degree of certainty from year-to-year.

7. For purposes of determining what amounts of the Area office recurring budget can be reduced for payment of CSC, I first excluded certain funds from the Area office budgets

because those dollars belong to the Tribes based on tribal contracts and compacts (including buybacks) negotiated under Title I and III of P.L. 93-638, as amended. (See Block B—Exclusions) These amounts are fixed and cannot be reduced except in instances of reductions of appropriations. See section 106(b)(1-5), P.L. 93-638, as amended.

Lines C, D, and E represent exclusions for contracts (Title I), compacts (Title III), and buybacks under P.L. 93-638, as amended. Title I refers to contracts awarded for self-determination operations where tribes have formally requested to administer and operate PFSAs operated by the Indian Health Service. Title III refers to compacts awarded for self-governance operations of PFSAs. Buybacks represent those PFSAs that the tribe has contracted or compacted but now want the IHS to carry out portions of the PFSA on their behalf. The buyback funds belong to the tribe as a part of their contract/compact, and the IHS is merely performing at their request.

8. Row G is the Adjusted Services Funding for Direct Federal Operations. This represents the net amount of funding that each Area has for operations of Federal IHS medical and preventive services in a that Area that are not encumbered with mandatory payments to tribes for Title I or Title III contracts/compacts. This amount is calculated by taking the net Services Appropriation (Row A) less mandatory payments to Titles I and III tribal payments (Row F) to arrive the balance at Row G.

9. Row H is the Area percentage of Revised Allowance. This is a percentage distribution of the net Area Office recurring allocation to the total Federal operations after exclusions have been made (Row G, Line 13). To arrive at this percentage, I divided the net recurring base of each Area (Row G) by the total (Row G, Line 13). For example, Aberdeen (Row G, Column 1), $85,850,417/$768,774,466 = 11.2%; Alaska (Row G, column 2, $55,992,886/$768,774,466 = 7.3%, etc.

This figure shows the relative percentage burden of paying total CSC spread among all Areas in an equitable manner.

10. Row I is each Area's share of $29.2 million CSC need. This represents each Area's reduction in order to pay the total CSC on the ISD Queue of $29.2 million. This figure is calculated by multiplying the individual Area percentages in Row H times $29.2 million. For example, for Aberdeen, $29.2 million x 11.2% (Row H, Column 1) = $3,263,047; Alaska, $29.2 million x 7.3% (Row H, Column 2) = $2,128,207; Albuquerque, $29.2 million x 6.8% (Row H, Column 3) = $1,977,209, etc.

11. IHS developed a methodology for calculating the amount of money needed by Area to fund the total CSC ISD Queue for FY 1996 using the only funds available to IHS. This method takes into consideration the relative recurring funds within an Area to spread the burden of any funding reduction equally throughout IHS and to spread the reduction between salaries and other items of expense. Actual Area reductions will probably vary according to each Area's precise circumstance; however, I tried to provide a framework and a rationale so that there could be as much consistency as possible throughout IHS. I gave overall guidance for Area office average salaries and provided the assumption that the reduction should not be taken entirely out of salaries but also other types of expenses (i.e., travel, training supplies, etc.) as well.

12. Rows J, K, and L represent the distribution of the reduction by Area broken out by salaries and benefits and other expenses. The calculation of the total reduction was split 80% for salaries and benefits (Row L) and 20% for other expenses. This split recognized that the Areas recurring allocations include all types of expenses; therefore, it was reasonable to assume that some of the reduction would include expenses other than personnel. The 80% and 20% split is an estimate and in reality the Areas will allocate the

reduction within personnel and other costs based on their unique circumstances.

13. Row M represents Area Average Salary for Personnel and Benefits. This figure was provided to the Areas as guidance on what amounts could be realized by a reduction-in-force (RIF). The average salary and benefits cost for an employee in each Area is calculated by dividing the salaries and benefits costs experienced during FY 1996 by the number of full-time equivalent (FTE) employment.

14. Rows N and O represent the number of employees that would have to be fired to realize the reduction for full funding of contract support costs. This is calculated by dividing the Area share of the salaries and benefits (Row L) by the Area average salary cost (Row M). For example, for Aberdeen (Column 1 Row L) divided by column 1, Row M, or $2,610,438/$42,157 (Column 1, Row M) = 62 (Column 1, Row O), etc.

15. Row P represents the number of FTEs allocated to each area before any RIF.

16. Row Q represents the number of estimated remaining FTEs per Area after the necessary RIF.

17. Rows R and S are estimated costs associated with a RIF. Federal employees who are involuntarily separated, without cause, are entitled to certain benefits, severance pay and lump-sum leave. Because the Area offices will be required to conduct a RIF in order to come up with the funds for CSC, the Areas offices and Service Units must pay additional separation costs. In order to pay these separation costs, additional staffing reductions will be necessary at each Area office and Service Unit for a one-year temporary period only. Severance pay calculation was developed as a percentage of average salary plus an estimate for lump-sum leave (unused annual leave).

18. Row T is the estimated total additional amount needed by each Area to pay for separation costs associated with the RIF. This amount is calculated by multiplying the average severance pay times the FTE reduction (Row O). The estimated amounts may not be exact due to rounding and the calculation of the formula in the software in the computer.

19. Row U is the estimated number of additional full time employees that the Areas would be required to fire temporarily (one year) in order to meet the targeted funding reduction in their recurring base.

20. Pursuant to authority of 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed in Rockville, Maryland, on February 18, 1999.

/s/ Daniel J Cesari
DANIEL J CESARI

[See JA Vol. II, PART II for attached table]

INTERIOR BOARD OF CONTRACT APPEALS

IBCA 3877-98 through IBCA 3879-98

CHEROKEE NATION OF OKLAHOMA,
Contractor-Appellant,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
(INDIAN HEALTH SERVICE)
Appellee.

DECLARATION OF CARL L. FITZPATRICK

I, Carl L. Fitzpatrick, declare as follows:

1. I am the Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service. I have held this position for five years.

2. The Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service (IHS) is responsible for formulating and executing the IHS budget. I have personal knowledge regarding the IHS Headquarters budget, contract support cost allocations, and reserves and past year appropriations accounts.

3. Each fiscal year, IHS receives a lump sum appropriation for "Indian Health Services." IHS' total appropriation from Congress for "Indian Health Services" in fiscal year 1996 was $1,744,494,000. The IHS obligated all of the funds that Congress provided in its "Indian Health Services" appropriation for fiscal year 1996 for programs serving tribes, either directly or through self-determination contracts and compacts, with the exception of some minor unobligated sums.

Appropriations Structure

4. The annual appropriation for "Indian Health Services" is structured on the basis of budget subactivities such as, Hospitals and Clinics, Dental, Mental Health, Alcohol and Substance Abuse, Immunization, Contract Medical Care, Tribal Management, and Contract Support Costs. Congress approved these budget subactivities during the budget process as appropriate purposes for IHS' expenditure of the funds.

5. IHS submitted its budget request for fiscal year 1996 based on these subactivities for Congress' review in the so-called Congressional Justifications, by which IHS explains its portion of the President's budget request to Congress prior to the start of the fiscal year. Then, when Congress actually appropriated the money for fiscal year 1996, Congress earmarked the funds for each subactivity for which the appropriation was intended by specifically listing funding for the subactivities in its appropriation committee reports. Any increases that Congress provided for fiscal year 1996 were reported by subactivites in the appropriation committee reports.

Appropriation Increases for Fiscal Year 1996

6. Attached as Exhibit 1 is a table showing the history of the fiscal year 1996 IHS appropriation request for "Indian Health Services." This table, prepared on September 23, 1996 by my office in the regular course of business, traces the IHS request for appropriations that year through the Department of Health and Human Services, through the Office of Management and Budget and the President's request to Congress, through the House, Senate, and Conference actions to the final appropriation.

7. The table shows the appropriation increases over the appropriation for fiscal year 1995 earmarked by budget subactivity. These increases are: (1) $16,152,000 for mandatory cost of living pay increases; (2) $7,500,000 for the Indian

Self-Determination (ISD) Fund; (3) $10,512,000 for staffing of new facilities earmarked by facility ($840,000 for the hospital in Kotzebue, Alaska; $6,392,000 for the hospital at Shiprock, New Mexico; $3,144,000 for the Alaska Native Medical Center in Anchorage, Alaska: and $136,000 for the Hays Health Center in Montana); (4) $750,000 for epidemiology centers; (5) $1,500,000 to enhance IHS' billing and collection systems to collect third party revenue; (6) $2,500,000 for contract medical care; (7) $3,000,000 for the urban Indian health program; and (8) $200,000 for the ongoing Indians into psychology program. These increases total $42,114,000.

8. These increases were offset by decreases of $400,000 for an Office of the Assistant Secretary staff transfer; $2,000,000 for the Indian health professions program; $3,000,000 for tribal management grants; and $2,000,000 for Headquarters direct operations totaling $7,400,000. This leaves a total net increase in the "Indian Health Services" appropriation for fiscal year 1996 of $34,714,000.

Overview of IHS Allocations by Subactivity

9. The majority of the IHS' budget is allocated each year on a recurring basis to the twelve Area Offices and to Headquarters. Funds are allocated by subactivity to pay for the many health services and programs that IHS directly provides or that the tribal contractors independently provide. These subactivities include Hospitals and Clinics, Dental, Mental Health, Alcohol and Substance Abuse, Immunization, Contract Medical Care, and Tribal Management, among others. Included with the Area Office allocations are amounts for contract support costs (CSC) for existing contracts, as well as CSC for new and expanded contracts that are to be distributed to the tribal contractors within the various Areas.

10. For purposes of allocating the IHS budget, IHS has twelve Area Offices, as well as Headquarters. Like the other Area Offices, Headquarters receives an allowance from the

total IHS budget. The Headquarter's allowance is broken down by subactivity and is used for the administrative functions and services provided by Headquarters for the entire IHS. Some of these funds are for those commitments that must be managed by Headquarters, e.g., funds for scholarship awards to individual Indians. Apart from funds supporting non-contracted programs and the Headquarter's Residual, the Headquarter's allowance is subject to disbursement to tribal contractors as Headquarter's shares.

11. The Headquarters' managed budget also consists of funds that are allocable to tribes for certain programmatic functions, but, because the need for such funds cannot be quantified at the beginning of the fiscal year, the funds are distributed by Headquarters to the Area Offices during the course of the fiscal year on a non-recurring basis for subsequent distribution to the tribal contractors and directly-operated service units. Examples are the Catastrophic Health Emergency Fund (CHEF) established under Title II of the Indian Health Care Improvement Act to reimburse service units for extraordinary medical costs and certain program funds distributed based upon workload or other level of need formulas.

12. The second part of the IHS Overall Budget are the IHS Headquarter's Reserve Accounts. A small portion of the IHS Budget is not allocated immediately to the Area Offices, but is retained in Reserve Accounts by subactivity, in anticipation of unexpected needs and funding emergencies arising during the course of the fiscal year. These funds are provided to the Area Offices during the fiscal year on a non-recurring basis (i.e. toward expenses that do not occur in the same area in the same amounts every year) for subsequent distribution to tribal contractors and/or IHS-operated service units as needs arise. If there are remaining funds at end of the fiscal year, the balances of the Reserve Accounts are distributed to the Area

Offices prior to year end for subsequent distribution to tribal contractors or for IHS' direct operations.

13. The third, and remaining, portion of the IHS' Budget consists of funds set aside for Area Office and IHS Headquarters' Residual. These residual funds support inherently federal functions needed for the IHS to function as a federal agency even if all IHS programs were contracted or compacted by tribes. Neither the Residual for IHS Headquarters nor the Residual for the individual Area Offices is available for reprogramming (i.e. to make up for the contract support cost shortfall).

IHS Area Office Allocations

14. For purposes of health services delivery, each Area Office is subdivided administratively into service units. A service unit provides health services to IHS beneficiaries within a defined geographic area. Service units may be directly operated by the IHS or operated by tribes or tribal organizations under Self-Determination contracts or Self-Governance compacts pursuant to the Indian Self-Determination Act.

15. There are approximately 150 service units within the IHS system nationally. These include some 500 direct health care facilities, 49 hospitals, 195 health centers, 8 school health centers, and 289 health stations, satellite clinics and Alaska village clinics. As of 1996, IHS directly operated approximately 65% of its service units. The remaining 35% were operated by Tribes and tribal organizations which had entered into self-determination contracts and compacts with HHS pursuant to the Indian Self-Determination Act.

16. Whether operated directly by the IHS or by tribal contractors and compactors, service units are funded for the most part on a recurring basis from the various subactivities of the appropriation discussed above. IHS distributed most of its "Indian Health Services" appropriation for fiscal year 1996

to its twelve Area Offices on a recurring basis by budget subactivity.

17. Each Area Office in turn allocates to its service units (whether directly or tribally operated) the service unit's share of the Area's recurring budget (including mandatories and programs increases) for that fiscal year. Increases earmarked for particular service units are allocated to those service units. For example, as noted above, the IHS received a $10,512,000 increase in fiscal year 1996 for staffing of four new facilities. Because this increase was earmarked for particular facilities, the increase was distributed to those Areas wherein the facilities are located, such as the Navajo Area where the Shiprock hospital is located.

18. In addition to its recurring service unit budgets, each Area Office also has a recurring budget for Area Office administrative support services which support delivery of health services at the service units. Tribes and tribal organizations may contract and compact their "tribal shares" of the Area administrative support services associated with their service units. Thus, most Area Office administrative support functions are, except for a small Area residual, subject to contracting and compacting under the ISDEA.

19. Those tribes and tribal organizations contracting or compacting for their share of the Area Office administrative support functions also received on a recurring basis their shares of the funds supporting those contracted and compacted Area administrative support functions. Funds supporting Area administrative support functions for the Area's directly operated service units remained in the Area Office budget to support those activities at the Area Office level.

20. Attached hereto as Exhibit 2 are documents entitled "Services Appropriation, Recurring/Non-Recurring Allocations for FY 1996" prepared by my office after the end of the fiscal year in the ordinary course of business. The tables

summarize the Area allocations on a recurring and non-recurring basis for fiscal year 1996. As the tables demonstrate, IHS allocated to its Area Offices on a recurring basis approximately $1.212 billion of its "Indian Health Services" appropriation. The tables also show non-recurring allocations to the Areas from Headquarters accounts including the redistribution of self-governance funds to the tribes.

Headquarters' Managed Budget

21. The tables comprising Exhibit 2 also show the allocations to Headquarters by subactivity.

22. Attached as Exhibit 3 are tables showing a further breakdown of Headquarter's reserve accounts by subactivity. These documents were prepared by my office on September 25, 1996, in the ordinary course of business with handwritten notations made by Brenda Fookes of my office. The tables show, for example, that Headquarters reserved approximately $11,570,000 of the approximately $834,700,000 set aside for the Hospitals and Clinics budget subactivity for fiscal year 1996. In addition, Headquarters had reserves of $1,171,900 for dental, $702,500 for mental health, and $2,194,600 for alcohol/substance abuse programs, $9,913,900 for contract medical care, to name a few.

23. The attached tables show breakdown of the allocation and disposition of these reserve accounts. For example, the reserve of $11,570,000 for the hospitals and clinics subactivity consisted of $4 million for the IHS Director's emergency fund to be used for emergency situations that may arise throughout the national IHS health delivery system over the course of the fiscal year; $638,600 was reserved for Health Promotion/Disease Prevention (HP/DP) activities; $224,733 for model diabetes programs; $1,195,200 for nursing activities; $750,000 for the IHS epidemiology center; $1,500,000 for collection and billing activities; $75,000 for non-physician co-step activities; $1,707,100 for recruitment

and retention of personnel; and $1,012,500 for program evaluation. The table shows expenditures during the course of the fiscal year for each of these categories within the Hospitals and Clinics reserve account, leaving a zero balance at the end of the fiscal year.

Contract Support Allocations

24. Congress earmarked a total of $153,040,000 in its appropriation committee reports for contract support costs for fiscal year 1996. This amount included a $7.5 million ISD Fund segregated in the appropriations statute as a separate fund "available until expended." The $7.5 million ISD Fund was distributed to the Areas on the basis of priority placement of tribal requests for ISD funding maintained on the ISD priority (queue) list with the exception of $195,478 which was distributed the following year. The remainder of Congress' earmarked allocation of contract support funds, with the exception of the $7.5 million ISD Fund, was allocated to the Area Offices for existing tribal contracts and compacts.

Unobligated Balances

25. At the end of every fiscal year, there is typically a very small sum of "unobligated" money. IHS usually becomes aware of these unobligated funds after the close of the fiscal year around mid-October when the IHS completes its accounting process for closeout of the fiscal year. My duties include monitoring these unobligated balances. The appropriation account remains available for five years for recording, adjusting, and liquidating obligations properly chargeable to that fiscal year appropriation account.

26. I have consulted records maintained by my office in the regular course of business which show that IHS had $1,406,176 unobligated from its "Indian Health Service" appropriation for fiscal year 1996 at the end of the fiscal year.

27. After the close of each fiscal year, IHS continues to record expenses that had been incurred during the course of that fiscal year. The unobligated balances are used to satisfy those incurred expenses. As a result, to date, all unobligated funds from fiscal year 1996 "Indian Health Services" appropriation have since been spent either for IHS' direct operation of programs for tribes, or for the funding of self-determination contracts and compacts that allow Tribes to operate the programs themselves. In other words, funds that are "unobligated" at the end of the fiscal year are later used to satisfy IHS obligations from that year and are no longer available for reprogramming for contract support.

CSC Shortfalls

28. Congress has consistently underfunded contract support costs in connection with self-determination contracts and compacts. In 1996, for example, the IHS received requests for contract support costs for newly acquired or expanded programs that exceeded the Congressionally established $7.5 million ISD Fund established in the appropriation statute to provide CSC for that purpose by $29.2 million.

29. As explained above in paragraph 7, the IHS received increases totaling $42,114,00 for the "Indian Health Services" appropriation for fiscal year 1996. The $7.5 million ISD Fund was distributed for CSC. The $16,152,000 increase for mandatory pay increases was distributed across the board to all IHS and tribally operated service units nationwide. The $10,512,000 earmarked for staffing of four new facilities was distributed to those facilities to support delivery of health services to the tribes served by those facilities. The $3,000,000 increase for urban health programs funded under Title V of the Indian Health Care Improvement Act. The $2,500,000 increase for contract medical care was distributed to the Areas for contract health services. The $750,000 increase for epidemiology centers was used for three centers for collecting epidemiology data for the benefit of the IHS

delivery system nationwide. The $ 1,500,000 increase to enhance IHS billing and collection systems was allocated to IHS Headquarters and used to enhance IHS' ability to bill and collect from Medicare, Medicaid, and other third parties. Finally, the $200,000 increase earmarked for the Indians into Psychology Program was allocated to that program.

30. Reprogramming any of these increases for CSC in fiscal year 1996 would have taken funds used to support programs and projects serving tribes. Furthermore, if IHS were required to pay the shortfalls on the ISD queue list for every tribe and tribal organization with unfunded requests on the list, IHS would have been required to deduct approximately $29.2 million from amounts allocated to support health service delivery programs for other tribes.

The following is true and accurate to the best of my knowledge and belief. Executed in Rockville, Maryland this 27 day of March, 2000.

/s/ Carl L. Fitzpatrick
CARL L. FITZPATRICK

[See JA Vol. II, PART 2 for attached tables]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 02-1286

TOMMY G. THOMPSON, Secretary of Health and Human Services,
Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,
Appellee.

APPEAL FROM THE DEPARTMENT OF INTERIOR BOARD OF CONTRACT APPEALS IN NOS. 3877-3879/89 ADMINISTRATIVE CHIEF JUDGE BERNARD V. PARRETTE

APPELLEE'S SUPPLEMENTAL BRIEF

LLOYD B. MILLER, ESQ.
MELANIE B. OSBORNE, ESQ.
SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP
900 West Fifth Avenue, Suite 700
Anchorage, Alaska 99501-2029
(907)258-6377

Attorneys for Appellee
April 24, 2003

TABLE OF CONTENTS

ARGUMENT 1
CONCLUSION 9

TABLE OF AUTHORITIES

Cases — Page

Blackhawk Heating & Plumbing Co. v. United States, 622F.2d539(Ct.C1.1980) 6, 8
Ramah Navajo School Board v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996) 2
United States v. Winstar, 518 U.S. 839 (1996) 7

Statutes

25 U.S.C. § 450j-l(b)(l) 9
25 U.S.C. § 450j-l(b)(3) 9
25 U.S.C. 5 450j-l(b)(4) 9

Rules

Fed.R.Evid. 201(b) 4
Fed.R.Evid.201(d) 4
Fed. R. Evid. 201(f) Advisory Comm. Note 4

Administrative Decisions

LTV Aerospace Corp., 55 Comp. Gen. 307 (1975) 6
Matter of Forest Service, B-231, 711, 1989 WL 240615 (Comp. Gen. Mar. 28,1989) 6, 10

Other Materials

Department of Health and Human Services, Indian Health Service, "Justification of Estimates for Appropriations Committees" FiscalYear1996 ..... 4, 5, 7, 9
Department of Health and Human Services, Indian Health Service, "Justification of Estimates for Appropriations Committees" FiscalYear1997 ..... 4, 5, 7, 9

TABLE OF AUTHORITIES

Page

Department of Health and Human Services, Indian Health Service, "Justification of Estimates for Appropriations Committees" Fiscal Year1998 .....4, 5, 7, 9

U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ("APPROPRIATIONS LAW") (available on Westlaw under "GAO REDBOOK") 8, 10

ARGUMENT

At the Oral Argument held April 9, 2003, the Court directed the parties to answer the following question:

> Judge Dyk: The question is were there funds that the Secretary could have used to satisfy these contract obligations that were not obligated under contracts with other tribes or otherwise restricted by the appropriations legislation.[1]

As discussed below, both the record and judicially-noticeable public documents reflect that no more than 35% to 43% of the Indian Health Service's ("IHS's") entire appropriation was obligated to tribal contracts in any one of the three subject years. These same sources show that, depending on the year, only 52% to 57% of the IHS appropriation was either committed to those tribal contracts or otherwise restricted by unrelated statutory earmarks. With respect to the legal availability of appropriations, these materials thus definitively refute any suggestion that IHS was limited in reprogramming its lump-sum appropriation to pay

---

[1] Supp. Add. 25 (Appellee's transcription of the April 9, 2003 oral argument). When the Court first discussed its request, the panel said this:

> Judge Clevenger: [T]he panel would like to have supplemental briefing from both sides to be submitted . . . on this point about whether there were funds available. We're talking about whether, in the given year, was there money that the Secretary could have used to pay the bills that you submitted to it.
>
> [counsel interruption]
>
> Judge Dyk: Without violating the contract obligations to other tribes.

Id. at 18. *See also id.* at 10 (Judge Clevenger) (questioning whether the Secretary may have "made a mistake and entered into too many contracts, if you will").

Appellee's contracts because of competing obligations to other contractors or other mandatory programs.

1. The issue addressed in this Supplemental Brief arises late in the day only because Appellant's colloquy with the Court suggested, for the first time ever, that in fiscal years 1994, 1995 and 1996 IHS faced a situation where the agency had over committed itself to pay more to tribal contractors than was contained in its unrestricted lump-sum appropriation.[2] As the record and incontrovertible public facts reflect, however, such a claim cannot be sustained.

Although the Secretary below never offered any proof on this point with regard to two of the three fiscal years at issue, the Secretary's limited proof for FY 1996 is sufficiently revealing. The affidavit of Daniel J. Cesari states that of IHS's non-earmarked FY 1996 adjusted appropriation of "$1,375,245,000,"[3] a total of only $606,470,534" was committed to contracts under "Title[s] I & III" of the ISDA.[4] By declarant Cesari's reckoning, the balance of $768,774,476 was neither committed to such contracts nor earmarked. As Appellee noted at oral argument, Supp. Add. 16, these contract commitments represent only about 35% of FY1996's entire appropriation (including earmarks). See also JA 478-79, ¶15 (similarly declaring that in FY 1996 only "35% [of the agency's field "service units"] were operated by Tribes

[2] Were this true, the situation would be comparable to that faced by the court in *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). Rather than simply refusing to pay some contractors over others, the agency would have been required to "impos[e] . . . a pro rata reduction among all the eligible Tribes" within the available appropriation amount. *Id.* at 1348.

[3] JA 451, ¶ 6 (explaining adjustments); *see also* JA 458 (line (A), col. 13).

[4] JA 458 (line (F), col. 13); *see also* JA 452-53,¶7 (explaining this part of the JA 458 table). For a discussion of Titles I and III, *see* Answering Br. 10 n.22.

and tribal organizations which had entered into self-determination contracts and compacts"). Thus, any suggestion that the total IHS FY 1996 appropriation was over-committed by excess agency commitments to tribal contracts is affirmatively disproved by the limited evidence the Secretary offered below.

2. Appellant's speculation is also disproved by other public records. Each February the President submits a proposed Budget to Congress for the coming year. The President's Budget covers every federal agency, and each agency in turn develops its own Congressional Budget Justification. Each Justification sets forth details supporting the President's Budget, including how the agency plans to spend its appropriations in the current year, and how it spent them in the immediately preceding year.

In the case of IHS, the Department of Health and Human Services ("DHHS") annually submits to Congress IHS's "Justification of Estimates for Appropriations Committees" (hereafter "IHS Budget Justification"). *See* Supp. Add. 26-34 (attaching excerpts of FY 1996 through FY 1998 IHS Budget Justifications).[5] What is most significant here, given the Court's question, is that each IHS Budget Justification reports on IHS's appropriations expenditures in the most-recently concluded fiscal year *by separating out the agency's expenditures on tribal contracts from all other agency expenditures*. Thus, the FY 1996 IHS Budget Justification details IHS's FY 1994 spending in a convenient one-page Table that separates out IHS spending on tribal contracts from all other IHS spending that year. Supp. Add. 27. The FY 1997

[5] Such DHHS official publications, widely available to the public, are judicially noticeable under Fed. R. Evid. 201(b) and (d). *See also* Advisory Comm. Note to Rule 201(f) ("judicial notice may be taken . . . on appeal"). IHS now posts these Justifications on its website. *See http://www.ihs.gov/ PublicInfo/PublicAffairs/Press Releases/Press_ Release_2002 Release-3 IHS_2003_Budget_Justification_Docs.asp.*

and FY 1998 Budget Justifications contain similarly detailed Tables reporting on all IHS tribal contract spending in FY 1995 and FY 1996, respectively. Supp. Add. 30, 33.

These annual IHS Budget Justification Tables permit one to determine the portion of the IHS "Services" appropriation[6] that was committed each year either to tribal contracts or by restrictive appropriations Act earmarks, and correspondingly the portion of the IHS appropriation that was not so committed. As more fully discussed below, these documents show that unrestricted funds were available to pay Appellee's contract support costs in each of the years at issue.

For the Court's convenience, Appellee has prepared a chart, based upon the IHS Budget Justification Tables, entitled "PORTION AND PERCENTAGE OF IHS'S SERVICES APPROPRIATION NEITHER UNDER TRIBAL CONTRACT NOR EARMARKED IN APPROPRIATIONS ACTS" ("Chart"). Supp. Add. 35-36. The Chart restates the amounts IHS paid to tribal contractors each year under the Indian Self-Determination Act. Supp. Add. 35 at line 3. It also accounts for all remaining funds each year that were restricted in the Appropriations Acts. *Id.* at lines 5 and 6. As the Chart reflects, during the three years at issue here between 35% and 43% of IHS's "Services" appropriation was obligated to tribal contracts. *Id.* at line 4. When non-contracted earmarked funds are factored in as also unavailable for reprogramming to other purposes (including payment of Appellee's contracts), the Chart further demonstrates that the Secretary's combined contract payments and restricted earmarks still only consumed between 52% and 57% of his entire lump-sum appropriation in the three fiscal years, *id.* at line 9, leaving between $737,117,000 and $795,172,000 in legally-available funds subject to reprogramming to pay

[6] Only the IHS "Services" appropriation is at issue here. The agency's separate "Facilities" appropriation is not.

each of Appellee's contracts. *Id.* at line 7. *See Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980).

IHS's own Budget Justifications to Congress thus provide a complete answer to the Court's inquiry. Each year over three-quarters of a billion dollars were neither committed to tribal contractors nor restricted by annual appropriations Act earmarks. Thus, the Court is not faced with anything like the hypothetical situation discussed at oral argument (where the Secretary has "a billion dollars and the Secretary enters into contracts that pledge out 2 billion dollars"). Supp. Add. 15 (Judge Clevenger).

3. The foregoing discussion reaffirms the Cherokee Nation's opening proposition: (1) each year the agency had a lump-sum appropriation "to carry out the Indian Self-Determination Act" that contained no caps on tribal contract payments; (2) each year the entire portion of the appropriation that was neither statutorily earmarked to restricted purposes or committed to other tribal contracts was legally available to pay the Appellee's contract;[7] (3) each year these unrestricted amounts exceeded three-quarters of a billion dollars; (4) accordingly under Blackhawk, each year the Cherokee Nation's right to be paid vested in full as a matter of basic appropriations law; and (5) as government counsel candidly conceded at oral argument, Supp. Add. 13, under *United States v. Winstar*, 518 U.S. 839 (1996), vested contract rights could not later be annulled by Congress.

4. The foregoing discussion fully answers the Court's question. Before closing, however, we wish to discuss briefly the Secretary's Supplemental Brief. (With the exception of a chart prepared by government counsel, the parties have

[7] *See LTV Aerospace Corp.*, 55 Comp. Gen 307 (1975) and *Matter of Forest Service*, B-231711, 1989 WL 240615, at *2 (Comp. Gen. Mar. 28,1989).

cooperated in sharing with one another the documentary materials each would be presenting to the Court.)

The Secretary's presentation unfortunately does not come close to answering the Court's question. Recall that when government counsel stated her misunderstanding that "You would like to have a brief addressing the question of whether or not there are actually any funds left over in each one of these fiscal '[years]," Judge Clevenger corrected counsel by adding "[that are] not otherwise pledged to contract obligations." Supp. Add. 24. But the Secretary's brief does not address the amounts "not otherwise pledged to contract obligations." Instead, the Secretary's new proof returns to the same theme unsuccessfully advanced below: that each annual appropriation was eventually spent on something.[8] (We use the word "spent" loosely, because some of the hundreds of millions of dollars the Secretary's documents show as "unpaid obligations'' may well have later been "deobligated," and so not actually spent at all.[9]) But more to the point, the issue of full spending is legally irrelevant. If the Cherokee Nation's contract rights vested - that is, if (as demonstrated above) Congress enacted appropriations legally available each year to pay the Cherokee's contracts in full at the time the payments were due—under *Blackhawk* the Secretary's decision to spend his appropriation in other ways, instead of "reprogramming" to the extent necessary to pay these contracts, is simply no defense. So long as Congress did not

[8] *But see* Answering Br. 17 and Add. 259, 264, 268 (President's Budgets reporting "unobligated balance[s] available" years later); JA 482-83, ¶ 26 (noting "$1,406,176 unobligated from its [IHS] appropriation for fiscal year 1996 at the end of the fiscal year"); IHS Budget Justification Tables for FY 1994, FY 1995, and FY 1996, reporting the same left-over sums as the President. Supp. Add. 28, 31,34.

[9] APPROPRIATIONS LAW, at 7-51-52. *See, e.g.*, SF 133 for period ending Sept. 30, 1994 (FY 1994), dated 11/8/94 (sheet 13 of 77, line 13C), indicating $296,388,162.75 as the "Net unpaid obligations, Obligated balance."

alter the legal availability of the appropriation before each payment was due, under *Blackhawk* the payment rights vested.

Alternatively, the Secretary's new documents may be intended to go beyond the Court's narrow question and shore up the government's insufficient showing under the ISDA's "reduction clause." But if so, it again fails on the precise same counts the proof below failed, *see* Answering Br. 49-54, for: (1) it fails to answer how using unrestricted annual *increases* in appropriations could have forced *reductions* in ongoing programs serving other tribes; (2) it fails to fully disclose which portion of the agency's annual spending was *not* on a program serving other tribes; and (3) it fails to answer how using leftover year-end unobligated balances would have forced reductions anywhere. Indeed, on the second point the same IHS Budget Justifications (like the proof below) reveal that IHS annually held back between $43,588,000 and $49,471,000, not for "programs serving a tribe" (the language of the "reduction clause"), but for its own federal functions-its so-called "Direct Operations"[10]-conduct that both falls outside the narrow "reduction clause" and violates the direct statutory prohibitions on contract reductions set forth in 25 U.S.C. §§ 450-l(b)(l), (3) & (4). And on the third point, even the Secretary's cryptic documents continue to show substantial "[u]nobligated balances available" at the close of each year.[11]

CONCLUSION

The Secretary's proof below and his own public documents show that the Secretary's defense of unavailable appropri-

[10] Supp. Add. 27, 30, 33 (lines entitled "Direct Operations"); *see also* JA 487 (line entitled "Direct Operations", column entitled "FY 1996 Appropriation") (identifying $42,970,296 allocated to this purpose as of September 30, 1996).

[11] *See, e.g.*, SF 133 for period ending Sept. 30, 1994 (FY 1994), dated 11/8/94 (sheet 13 of 77, line 9A) ("$6,841,390.01").

ations fails, and that the Cherokee Nation's contract rights vested fully upon enactment of each appropriation. There were no caps on contract payments for "ongoing" contract support costs. And as the Secretary correctly concedes (and consistent with the views of the Comptroller General and the General Accounting Office ("GAO"), Office of Legal Counsel), there were also no caps on contract payments for "new" contract support costs.[12]

For the foregoing reasons, and those set forth in Appellees's prior submissions, the Board's decision below should be affirmed.

Respectfully submitted this 24th day of April 2003.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP

/s/ Lloyd Benton Miller
By: LLOYD BENTON MILLER
Melanie B. Osborne

900 West Fifth Avenue, Suite 700
Anchorage, Alaska 99501-2029
Telephone: (907) 258-6377

---

[12] As discussed at oral argument, this is because the term of art "shall remain available" does not create a cap. The Tenth Circuit's contrary conclusion erred by relying on a different term of art in appropriations law, while also overlooking that the cited GAO authority references *approvingly* the Comptroller General's conclusion that the *same* term of art at issue here is "neither [a] maximum nor minimum limitation on [the] amount available for a particular object." APPROPRTATIONS LAW, at 6-8 (citing *Forest Service* as "B-231711") (Supp. Add. 38). And without any cap, the rule that a specific appropriation takes precedence over a more general appropriation (Reply Br. 7 n.4) is irrelevant, as is the 'excess contracting' hypothetical disproved herein.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Supplemental Brief has been served on the following attorneys or parties of record this 24th day of April 2003 by overnight mail:

JEFFRICA JENKINS LEE
BARBARA C. BIDDLE
U.S. Department of Justice
Civil Division, Appellate Staff
601 D Street, NW, Room 9546
Washington, D.C. 20004

/s/ CHERI TABOR
CHERI TABOR

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

02-1286

TOMMY G. THOMPSON, SECRETARY OF HEALTH
AND HUMAN SERVICES,
Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,
Appellee.

Appeal from the Department of the Interior Board
of Contract Appeals in No. 3877-3879/98,
ADMINISTRATIVE JUDGE BERNARD V. PARRETTE

CERTIFICATE OF INTEREST

Counsel for the Appellee, Cherokee Nation of Oklahoma, certifies the following:

1. The full name of every party or amicus represented by me is:

Cherokee Nation of Oklahoma

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Cherokee Nation of Oklahoma

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

not applicable

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

LLOYD BENTON MILLER, ESQ.
MELANIE B. OSBORNE, ESQ.
SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON
900 West 5th Avenue, Suite 700
Anchorage, Alaska 99501-2029
(907) 258-6377

April 23, 2003

/s/ LLOYD BENTON MILLER, ESQ.
By: LLOYD BENTON MILLER, ESQ.
MELANIE B. OSBORNE, ESQ.
SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP
900 West 5th Avenue, Suite 700
Anchorage, Alaska 99501-2029
(907) 258-6377

Attorneys for Appellee

SUPPLEMENTAL ADDENDUM INDEX

	Page
Affidavit of Lloyd B. Miller, dated April 22, 2003	01
Appellee's Transcript of Oral Argument held April 9,2003 in HHS v. Cherokee Nation of Oklahoma, No. 02-1286	03
Department of Health and Human Services, Indian Health Service, "Justification of Estimates for Appropriations Committees" Fiscal Year 1996, excerpts of Tables at IHS-108 and SUP-8*	26
Department of Health and Human Services, Indian Health-Service, "Justification of Estimates for Appropriations Committees" Fiscal Year 1997, excerpts of Tables at IHS-121 and SUP-8*	29
Department of Health and Human Services, Indian Health Service, "Justification of Estimates for Appropriations Committees" Fiscal Year 1998, excerpts of Tables at IHS-118 and SUP-9*	32
Appellee's Chart entitled PORTION AND PERCENTAGE OF IHS'S SERVICES APPROPRIATION NEITHER UNDER TRIBAL CONTRACT NOR EARMARKED IN APPROPRIATIONS ACTS	35
U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (excerpt at 6-8, *available on* Westlaw under "GAO REDBOOK"*	37

* Highlighting has been added for ease of reference to the sections referred to by Appellee.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 02-1286

TOMMY G. THOMPSON, Secretary of Health and Human Services,

Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,

Appellee.

APPEAL FROM THE DEPARTMENT OF INTERIOR BOARD OF CONTRACT APPEALS IN NOS. 3877-3879/89 ADMINSTRATIVE CHIEF JUDGE BERNARD V. PARRETTE

AFFIDAVIT OF LLOYD B. MILLER IN SUPPORT OF APPELLEE'S SUPPLEMENTAL BRIEF

STATE OF ALASKA)
) ss:
THIRD JUDICIAL DISTRICT)

LLOYD B. MILLER, being first duly sworn upon his oath, deposes and says:

1. I am counsel of record for the Appellee Cherokee Nation in the above-captioned case.

2. Oral argument was held in the above-captioned case on April 9, 2003 at the Carl B. Stokes U.S. Court House in

Cleveland, Ohio. The Federal Circuit made an audiotape recording of the oral argument, which was then sent via Federal Express to my office.

3. Under my supervision the audiotape was transcribed by Peggy Crowe, a legal secretary in our law firm. Having listened to the audiotape while reviewing the transcript, and having thereafter made corrections to the transcript, I believe the attached transcript accurately reflects what is contained on the audiotape recording of the oral argument.

FURTHER YOUR AFFIANT SAYETH NAUGHT

Dated this 22nd day of April 2003.

/s/LLOYD B. MILLER
LLOYD B. MILLER

SUBSCRIBED AND SWORN to before me this 22 day of April 2003.

/s/ PEGGY S. CROWE
PEGGY S. CROWE
Notary Public in and for Alaska
My Commission Expires: 7/29/06

Appellee's Transcript of Oral Argument
held April 9,2003

HHS v. Cherokee Nation of Oklahoma, No. 02-1286

Judge Clevenger:

The panel has before it five cases, in four of which we are going to hear oral argument and in the fifth case a decision will be made on the basis of the briefs alone. Let me identify the cases for the record: 02-1286, The Department of Health and Human Services against the Cherokee Nation of Oklahoma; 02-1361, Nutting against Ram Southwest; 02-5134, Obadele against the United States; 02-1477, Inamed Corporation against Kuzmak; the case that will be decided on the briefs is 03-3093, King against the Department of the Navy. Now the court assumes that all counsel have been informed about the way in which the lighting system works. When the yellow light goes on, you're beginning to consume your rebuttal time, when the red light goes on, you're finished your time. Those of you who have not appeared in front of this court before, at least not in front of this presiding judge, you should know that if your, some or most of your argument time has been consumed by questions from the bench, the court tends to be generous in awarding you your rebuttal time notwithstanding the fact that we may have run over. I don't want you, if you haven't appeared before me before, I don't want you to be nervous if you see the yellow light come on and you're afraid that you're going to lose your rebuttal time. If the court has exhausted your direct time, we understand that. The first case is Health and Human Services against Cherokee Nation of Oklahoma. Ms. Lee, I understand you're going to reserve three minutes for rebuttal.

J. Lee:

That's correct Your Honor.

Judge Clevenger:

Further, counsel should correctly assume that the members of the bench have read your briefs with great care and are quite familiar with the facts, as well as the legal arguments so if you intend to spend a fair amount of your oral argument time talking about the facts that's your choice, but you would be better advised to proceed to the merits of your argument.

J. Lee:

May it please the court, Jeffrica Jenkins Lee from the Department of Justice here on behalf of the Secretary of Health and Human Services, the appellant in this case. The dispute here centers on the proper interpretation of the concluding clause of ISDA section 450j(l)(b) which conditions the funding of all aspects of self-determination contracts on the availability of appropriations. At issue is whether the Cherokee Nation is entitled to full payment and funding of its contract support costs for fiscal years 1994 through 1996, even though Congress failed to appropriate sufficient appropriations—

Judge Clevenger:

Do we know whether the contracts at issue are concerned with continuing contracts or are they new and expanded contracts?

J. Lee:

Well, there's, both issues are present here, Your Honor.

Judge Clevenger:

Both kinds of contracts?

J. Lee:

Both, both kinds of contracts. There was, the contract support costs that Cherokee is seeking additional

funding on involves the new or, new and expanded programs on contracts that they had operated before, as well as CSC for ongoing contracts.

Judge Dyk:

Do I understand that the government concedes that there's no legal restriction on HHS using reprogramming authority to spend more funds for the support costs than it elected to do?

J. Lee:

Well, our position is that under the statutory language as it existed, there's, in the appropriations language, there was no statutory cap as that term of art is used.

Judge Dyk:

So there was no legal limit imposed by the appropriations legislation.

J. Lee:

That's correct Your Honor.

Judge Dyk:

So, how is it then that the Secretary of HHS can say there's no legal limit, but I've made a choice not to make these payments under the contract? Why, why does the discretionary choice of the Secretary of HHS means that, means that funds weren't available within the meaning of the statute and the contract language?

J. Lee:

Well Your Honor, the Secretary believed that he had some limited discretion to allocate the funding that Congress made available. Now Congress in its committee reports recommended that various amounts be spent on certain projects, not only for contract support costs, but for the delivery of health care services to the Tribes.

Judge Dyk:

And that wasn't binding on him?

J. Lee:

It was not binding, but as the Tenth Circuit recently held in the Cherokee Nation case, involves the same Tribe with a different contracting year, that it was reasonable for the Secretary to not just completely ignore what the recommendations were in the committee report and to to use this limited discretion to apply those funds to the areas in the amounts that Congress had recommended or that the committees had recommended.

Judge Dyk:

So what you're doing is you're reading availability of funds to mean available in the Secretary's discretion?

J. Lee:

Well, no, not not really entirely, Your Honor, there are programs that the the Secretary has to fund, not only the Cherokee Nation's contracts, the Secretary has a responsibility to provide health care programs to non-contracting tribes. There are over 150 programs that either the Secretary directly operates or various other tribes operate on behalf of the Native Americans and Alaska Natives and the Secretary under statutory mandate is to make sure that all these tribes receive adequate funding for the delivery of health care services and not reduce any of those fundings to those tribes in order to pay full CSC. There's nothing—

Judge Dyk:

Well, that's the other, that's the other part of the provision here, that's not the availability of funds part.

J. Lee:

No, no, Your Honor, but but well they're related. It's all one clause. The Cherokee Nation chooses to kind of divide this up into two two different clauses, but it's all

one one one sentence there-the contracts are based on the availability of funds and

Judge Clevenger:

Well there are funds that are available, the Secretary just chooses not to pay them to the Cherokee Nation.

J. Lee:

Well, the Secretary is under a statutory obligation to all the tribes to—

Judge Clevenger:

I understand that, but I mean there are funds, if the Secretary wished, he has sufficient funds in the overall appropriation to pay the Cherokee Nation their contract support costs.

J. Lee:

Well not the Cherokee—

Judge Clevenger:

Isn't that, that's true, isn't it?

J. Lee:

No, Your Honor, because the Cherokee Nation's requests fell lower on the Queue than the other tribes who had requests that were greater than theirs and there's nothing in the statute that says that their, that their entitled to payment ahead of all these other tribes.

Judge Clevenger:

Okay, you have to help me out. Are you saying that all of the, all of these other tribes to which, which are being paid instead of the Cherokee Nation, they all have contracts with HHS also?

J. Lee:

They're on, the tribes that are on the Queue have—

Judge Clevenger:

But they're all under, all under contract?

J. Lee:

They're all under contract and the Cherokee Nation who I believe was number 17—

Judge Dyk

There were surplus funds at the end of the year, right? - millions of dollars of surplus

J. Lee:

Well according to the record evidence, the record evidence is only with respect to fiscal year 1996, and the Fitzpatrick Declaration, Mr. Fitzpatrick was the Director of Financial Management, said that all funds had been allocated at the beginning of the fiscal year and only minor unobligated funds were left at the end of the year.

Judge Clevenger:

I need some help. Let's just assume that there's, that there was an appropriation of a billion dollars for the costs, the medical costs for all of these contracts, right?

J. Lee:

Those contracts—

Judge Clevenger:

Let's just, yeah, let's just arguendo assume that is was a billion dollars, and let's assume that the Secretary here did the contracts with various tribes and/or nations just like the ones here, and the contracts all ended up with two billion dollars worth of contract service costs for the year of appropriation. Your point is that the Secretary is free to decide which contracts get paid and which don't?

J. Lee:

The way that it, that, because there was chronic under-funding of contract support costs, the Secretary developed a method for dealing with—

Judge Clevenger:

Chronic under-funding of contract support costs is not what I'm talking about. I'm talking about the overall program costs.

J. Lee:

Well, the tribes have received their funding for the direct operation—

Judge Clevenger:

I understand that.

J. Lee:

of the programs, we're just talking about the administrative costs, overhead costs, and they receive their full funding for the operation of the program, the actual delivery of health care services, and with respect to the ongoing contracts, once they have received that funding, they've received no less than what they received in the previous year, so they would be guaranteed that as their base funding and it's just the additional overhead costs in—

Judge Clevenger:

I'm, I'm still confused as to whether there's any money available to pay. I mean—

J. Lee:

No, there's no money to pay because the budget is allocated at the beginning of the, of the fiscal year. What happens is that the the Secretary makes a request to Congress as to, they look at what was spent on all of these different programs in a prior fiscal year, and then in the, for the coming fiscal year they request funding for each one of those programs based on what their history of funding has been in prior years. Congress may decide, well we want to give more money to this program than the Secretary has recommended.

Judge Clevenger:

I can understand that, but we're dealing with three years and we're not dealing with whether Congress is going to appropriate money tomorrow to pay for these contracts, we're dealing with three old years, aren't we?

J. Lee:

Right.

Judge Clevenger:

And the question, and there was something in the magnitude of billions that were appropriated for medical costs.

J. Lee:

Right, and it's not only the contract—

Judge Clevenger:

And there were some marks in the committee reports where the committee to Congress-people were saying, well we think maybe something in the magnitude of millions, 200 million dollars should go for continuing contract support costs and up to 7.5 or something for new and expanded. Right?

J. Lee:

That's right.

Judge Clevenger:

But you've now said that those marks in the committee reports and the 7.5 in the statute aren't caps; they don't, they don't restrict the Secretary from paying more. So as Judge Dyk said, if you're not restricted, and you're simply using your discretion to decide which tribe gets paid, how can you exercise that discretion in derogation of a contract right? Where does the Secretary get the authority to say, ["]well, I entered into a contract, I promised to pay the Cherokee Nation's contract support

costs and I have the money to do so, but I don't feel like doing it?["]

J. Lee:

No, that that's not what the Secretary's argument is. The Secretary is saying that he has other statutory mandates, and it's not only the Indian Self-Determination Act contracts that are funded by the lump sum appropriation, but there are other programs under the Indian Health Improvement Act, the Snyder Act, that the Secretary is responsible for funding. So the lump sum appropriation that Congress makes to the Secretary, as I was saying, was based on the Secretary's request based on what prior year funding had been and what Congress decided that they should spend in a particular year. And then

Judge Dyk:

But, didn't he have the authority to move the funds around?

J. Lee:

Well, we're saying that the Secretary was not prohibited fiom reprogramming, but the Secretary wasn't required to, because if—

Judge Dyk:

But he was required to by the contract. I mean, can it possibly be that when the contract talked about ["]subject to the availability of funds["] that it was talking about subject to the Secretary's discretionary choice as to—

J. Lee:

Well—

JudgeDyk:

Wait, wait, wait, as to how to use the funds? And in that respect, how do you distinguish the Blackhawk case?

J. Lee:

Well, in the Blackhawk case there was no, there was, the language of the agreement was not contingent on the availability of sufficient appropriations, and here the cont—, the sec—, the tribes contracted with knowledge that they wouldn't get their full funding unless there was sufficient appropriations and they knew at the time that they contracted that there was already deficits, there were already shortfalls in contract support costs, and they contracted with knowledge of that and, in fact, requested it be put, to have their contract support costs paid out of the ISD fund, which is the priority list.

Judge Clevenger:

Are you saying that, in a given hypothetical, the Secretary has in a given year let's say a billion dollars to spend for the purposes we're talking about for these contracts, and in that year it turns out that the Secretary has got 1, say 2 billion dollars worth of contract obligations, and then the Secretary spends the billion dollars at his discretion using a queue deciding, cause he had the same problem in years past, and so if you were gipped in years past you go up the ladder on the queue, and so the Secretary simply has the authority from year to year to continue sort of a Ponzi scheme to pay off the contracts. Is that what it is?

J. Lee:

Well, Your Honor, it's not a Ponzi scheme, but but the, this was a procedure that was developed by the Secretary in consultation with the tribes as a way of dealing with these shortfalls in appropriations, and the thing is that the tribes were eventually paid their contract support costs, although they might not have been paid in the fiscal year that they first requested funding, but it's not—

Judge Clevenger:

Is the Cherokee, is the Cherokee Nation standing in a queue now? Is it in a queue, where next year or some year after it can gobble up some appropriations from a later year?

J. Lee:

Well, the funds for, the queue system is no longer in effect, but at the time that they were placed, at the time of these fiscal years, there was a queue in place.

Judge Dyk:

They haven't been paid, they haven't, I mean

J. Lee:

No, they have not been paid.

Judge Dyk:

They're saying we ought to be paid,

J. Lee:

That's what they're saying.

Judge Dyk:

and my question is why is this different from Blackhawk because, in fact, Blackhawk had language in it, in the contract, ["]contingent on the availability of appropriated funds from which payment in full can be made["] and to me, that language looks very much like the language we're dealing with here. We held in Blackhawk the government couldn't welch on the contract. Why isn't the same result followed here?

J. Lee:

Because here the appropriated funding had already been allocated bef—, to other programs and the CSC funding had been already spent before we got to Cherokee's place on the queue and they—

Judge Clevenger:

All of the money, all of the, in the billions of dollars of the appropriation had already been pledged?

J. Lee:

It had been, except for for some unobligated funding. Now Cherokee—

Judge Clevenger:

What do you mean?

J. Lee:

Some unobligated amounts, the, it was the practice of—

Judge Clevenger:

Why couldn't those unobligated amounts be used to pay the Cherokee?

J. Lee:

Well, it was my understanding that these, it is my understanding that these unobligated amounts are held back so that they can be paid out for some type of like emergencies that might come up during the fiscal year and as far as—

Judge Clevenger:

So there was money, adequate money, to pay these contracts?

J. Lee:

No, no, there was not. It's my understanding, and the record doesn't—

Judge Clevenger:

Well how are we going to get to the bottom of that? It's the, it's the heart of the case because the government has, I gather different from the position you took in the Ninth and Tenth Circuits in earlier years, there are no caps here at all, it's solely a matter of the Secretary's discretion,

J. Lee:

Well, Your Honor—

Judge Clevenger:

and if there's any money left, if all the money is gone and is pledged pursuant to a contract, and the Secretary is simply trying to decide which contract to argue [sic], the contract, the Secretary made a mistake and entered into too many contracts, if you will. Maybe there's nothing we can do about that, but if there's any money left, you have almost no argument to, to sustain refusing to pay it over. How do we find out for sure whether there's any money left in the general appropriation?

J. Lee:

There are several points in what you say Your Honor that we'll respond to. First of all, with respect to the Ninth Circuit and the Tenth Circuit cases, there was not a statutory cap. It's the same, exact same situation that's involved here. There was no specific cap in the appropriations bill itself, yet the Ninth Circuit and the Tenth Circuit both found that based on the language in those appropriation acts, and the committee reports, that the Secretary was, was, it was legal for the Secretary to have appropriated the contract support costs in the way that they did and found that there was no money left. Now in the 1996, which is one of the fiscal years that was at issue here, that was the same fiscal year that was at issue in the Ninth Circuit case and the Ninth Circuit found that all the money was gone and there was, that there was nothing left to pay.

Judge Dyk:

Well, they interpreted the statute as imposing a statutory cap relying on committee reports, right?

J. Lee:
And on Section 314 that—

Judge Dyk:
They decided the case on a ground that the government is no longer willing to support, isn't that correct?

J. Lee:
Well, we, we, the Ninth Circuit found that there was a statutory cap that that could have been ambiguous whether or not there was a cap and that Congress cleared up any ambiguity in section 314. We had never—

Judge Dyk:
But you're not even, you're arguing that any more. You're not arguing, you began the argument by saying you're not arguing there's a statutory cap.

J. Lee:
Well, it's the same argument that we made in the Ninth Circuit and Tenth Circuit. We've consistently argued that based on a strict reading of the language that this did not qualify as a statutory cap. What we're saying is that Congress through, as Congress clarified really what Section 314, that they did intend for these amounts to be a cap on the amount that would be spent.

Judge Clevenger:
You disagree with that.

J. Lee:
Do we disagree?

Judge Clevenger:
You disagree with that. You say they are not caps.

J. Lee:
No, we were saying that under the precise language that was used that—

Judge Clevenger:
Well, that's right, but—

J. Lee:
the courts have held to be a statutory cap in the past, but that the Sec—

Judge Clevenger:
If, if, if, if the statutes didn't contain caps then 314 doesn't create caps in the statutes that didn't have them, right?

J. Lee:
Well, we're saying that section 314 clarified what Congress intended.

Judge Clevenger:
Which was?

Judge Lee:
That, that there actually be, that what they, that there be a cap, that what they appropriated to the agency and what they earmarked in committee reports that that would act as a cap, that that was all they intended to be spent.

Judge Dyk:
Are you arguing that there's a cap or not a cap? I'm confused. I thought you began the argument by saying there wasn't a cap.

J. Lee:
I'm sorry that, that, that I confused the Court because our position is that what in effect happened was that Congress clarified it and intended it to be a cap. When it, when the appropriations language—

Judge Dyk:
Is there a cap or isn't there a cap? Is there a statutory cap?

J. Lee:
Yes.

Judge Dyk:
Yes?

J. Lee:
Section 314 clarified that all Congress intended to be spent on—

Judge Clevenger:
So its your—

J. Lee:
contract support costs was the amounts that were recommended in the committee reports and the amounts that were actually appropriated.

Judge Dyk:
I thought your brief said there wasn't a cap.

J. Lee:
We said that there wasn't a cap under the language of, the way the courts have interpreted—

Judge Clevenger:
You, you, you say in footnote, footnote—

J. Lee:
that the legal term, a legal, it's a legal term of art.

Judge Clevenger:
footnote 17 on page 33 says in order for there to have been a statutory cap the language would have to read not to exceed. This is not a cap you say.

J. Lee:
For what? This is not a cap in the sense of the precise language that courts have said, you know this is a cap. But the courts have, the Ninth Circuit, the Tenth Circuit have interpreted, and we agree with the holdings in in those courts, and we make the same arguments here that

we made in those cases and we will submit that the Cherokee Nation case, the Tenth Circuit,

Judge Clevenger:
Let me just make, let me make one point and, cause we're going to have to move along. The, assuming that Section 314 does indeed convert what you say is not a cap into a cap, right?

J. Lee:
Yes, Your Honor.

Judge Clevenger:
That, that's your argument now, and you're, and 314 converts the marks in the, in the house reports into caps, correct?

J. Lee:
That's correct.

Judge Clevenger:
That's the same thing? Okay, and if that is retroactive, right? And if the contract rights vested before section 314 was enacted then you concede error under Winstar, don't you?

J. Lee:
No. Your Honor.

Judge Clevenger:
If, I said if the rights had vested

J. Lee:
Oh, if, if the rights had vested.

Judge Clevenger:
If the rights had vested?

J. Lee:
But we do not concede that the rights vested because the the tribes contracted with knowledge that it was, that their complete, their funding would be subject to the

availability of appropriations. The contract language included—

Judge Clevenger:

Part of the problem is that you're arguing both sides of the fence. You're saying, you started off by saying the whole case depended on the Secretary's discretion. The Secretary's a decent person, if the Secretary has two contract obligations equally valid, he has the choice of deciding which one he wants to pay. Now you've said, no that's not it at all, it's all subject to a cap and I suppose everybody agrees there's no money left under the House marks or under 7.5 million to pay. So I'm confused.

J. Lee:

Well, our position is that, at the time that the Secretary acted in those fiscal years, the Secretary was not reading the the language in the appropriations bills as being a, you know, a mandatory requirement, but the Secretary was aware of the consequences to the agency if it did not follow the suggestions of the committee report and it allocated the funding based on the recommendations in all those reports.

Judge Clevenger:

Is your argument that the Secretary's discretion to pay under one contract and, instead of under the other, frustrates vesting of contract rights?

J. Lee:

Well, it, the, the, our position is that they didn't have a vested right under the statute or in their, they had no vested right under the statute or under their contract because they knew that the funding was, was subject to the availability of appropriations, and they also knew that there had been chronic under funding of these, of the contract support costs and they contracted with

knowledge of that, and they really should not have expected that they would be paid their full contract support costs and—

Judge Clevenger:

They shouldn't have trusted the Secretary.

J. Lee:

certainly not ahead of all these other tribes and at the beginning of the year. I'm sorry?

Judge Clevenger:

They shouldn't have trusted the Secretary?

J. Lee:

I'm sorry, Your Honor?

Judge Clevenger:

They shouldn't have trusted the Secretary. They should have known better.

J. Lee:

Well, if both sides knew how the program, how the system operated and the, and the Cherokee Nation had been contracting for several years with the Secretary. They knew that they would eventually get their money. The Secretary has to enter into a contract when a tribe by a tribal resolution requests that the Secretary enter into a contract, and so the Secretary, it's up to the tribe to decide whether or not it wants to to contract and it knew when it contracted how CSC had been dealt with in the past and, in fact, many of the tribes were involved with the development of the pro—, of the ISD manual where this priority system was developed.

Judge Clevenger:

Thank you very much. We ate, we ate up all of your rebuttal time, we'll restore your rebuttal time. Mr. Miller.

L. Miller:

Thank you Your Honor and may it please the Court. This case tests the application of the rule that the government in its contracting relations is to be governed by the same rules that apply to private contracting parties, and we say that for two reasons. Number 1—

Judge Dyk:

. . . that's backwards, I mean private contracting parties don't have contracts subject to the availability of funds. It's not the same; it's a different—

L. Miller:

Once an appropriation is enacted by Congress, that contingency is over. It has been met. The government here argues that that's not enough. It also has the right, as the dialog with the bench indicated—

Judge Dyk:

You had a special problem here with respect to government contracts, and special language in here which we have to construe, so it's not just a question of saying they're bound like anybody else.

L. Miller:

Well, once a right vests under a contract, a private party, no more than the government, could come back five years later and declare that the appropriations which had been legally available in 1994 were not legally available after all, and so Congress tried to do in 1998 at the behest of the Agency in the wake of litigation which had found the government liable under a similar contract in a different case.

Judge Clevenger:

What happens if the overall appropriation for a given year for the health services is a billion dollars and the Secretary enters into contracts that pledge out 2 billion dollars. So the Secretary's got 2 billion dollars worth of

contract obligations and he's only got a billion dollars to pay it with, and so he's got a system and he says what I do is I've got a ranking, a ranking order, and if you got gipped, if you're one of the, of the contract parties that didn't get paid in year 1, you go up the ladder so next year when the same problem happens again cause Congress never gives me enough money for this stuff, you'll get paid later on.

L. Miller:

Yes, Your Honor.

Judge Clevenger:

Now, let's assume that's the situation and you're one of the parties that didn't get paid in the fiscal year cause the billion dollars got ate up before they got to your bill. Do you have a gripe?

L. Miller:

There would be rules to apply in that situation, Your Honor. If the entire appropriation was committed to contracts, appropriations law permits the Agency to make reasonable decisions amongst the contractors.

Judge Clevenger:

[inaudible]

L. Miller:

The Ramah Navajo School Board decision from the D.C. Circuit says that in that situation, which was present there, the Agency is under an obligation to fund all of the contractors as much as possible, thus a pro rata payment to the contractors would be in order. But that's not what happened here, on two scores.

Judge Clevenger:

In pushing Ms. Lee, I understood her to be saying that the money is all gone.

L. Miller:

Your Honor, the problem with the hypothetical is that it's not actually what happens. Only about a third of the IHS system is contracted. Fully two-thirds of the system isn't subject to any contract, any mandatory payments under contracts at all. Only about a third—

Judge Dyk:

Where do we find that in the record?

L. Miller:

I don't believe that data is in the record Your Honor, either way. I, forgive me, Your Honor, I do believe that in the, possibly the Cesari affidavit or the Fitzpatrick affidavit has data about the volume of contracting by the Agency. I would have to double check the record Your Honor. The bulk of the Agency is consumed by direct services by the Agency to tribes and administrative overhead costs of the Agency, federal functions, secretarial administration—

Judge Dyk:

How are we supposed to know that?

L. Miller:

Oh, I can show this to you Your Honor on page, in the record, page 487 of the Fitzpatrick affidavit, it has a line item budget that talks about clinical services, preventive health services, and direct operations. Now the direct operations are the Agency's—

Judge Clevenger:

Wait, wait, wait, 487?

L. Miller:

487 Your Honor. (Pause.) Now the government spends the bulk of its defense in this case on the reduction clause. It's not really about availability, as I think the colloquy with the bench indicated, it's about the

reduction clause. In paying us would they have been forced to reduce the programs—

Judge Clevenger:

Tell us how to read this.

L. Miller:

Okay. We have two parts, and I'll hold it up Your Honor, it's split, it really runs across this way, but they put the second part of the table on the bottom. On the top part you see clinical services and then each of the 12 Area Offices running across the top, so you have the Aberdeen Area, the Alaska Area, the Albuquerque Area, and so on. How much is allocated to all of those, each of those areas for clinical services, hospitals and clinics, dental, mental health and so forth. Then there's another type of health care called preventive health services—public health nursing, health education and so forth. That takes care of the services. And I know Your Honor that about a third of those services are contracted by tribes, we're looking for it in the record. Then—

Judge Dyk:

So everything above the line is obligated under contract to the various tribes?

L. Miller:

No, Your Honor. A third of what is above, a third of what is, below the line and above the line is the same chart Your Honor, it just extends for six more areas.

Judge Dyk:

A third of it, how do we know?

L. Miller:

Excuse me. (pause) Yes, you see right, the middle line of the page it says ["]Nashville, Navajo, Oklahoma, Phoenix, Portland, Tucson.["] It's just a continuation of the top part of the chart.

Judge Dyk:

Okay, but how do we know that the amounts at the top part, that only a third of those are—

L. Miller:

We are locating that in the record Your Honor. I'll have it for you in a moment. Then you have, so you have those services, those are the, actually the health care services and then you have the Agency, like any agency has direct operations to run their Headquarter's offices, their Area Offices, what you see in this year was 42 million dollars.

Judge Clevenger:

Just so we don't eat up a whole lot of time in the argument, the panel would like to have supplemental briefing from both sides to be submitted no less than a week after today, if that doesn't cramp you too much, and I assume it doesn't, on this point about whether there were funds available. We're talking about whether in the given year, was there money that the Secretary could have used to pay the bills that you submitted to it.

L. Miller:

Well, let me, let me address—

Judge Dyk:

Without violating the contract obligations to other tribes.

L. Miller:

Absolutely Your Honor, but perhaps in the balance of my presentation Your Honors will find that may not be necessary for the following reasons: This came up on summary judgment before the Interior Board of Contract Appeals. There are three contract years at issue-'94, '95, '96. The government said it didn't have to pay because it would have been impossible for the government to pay without reducing services to ongoing tribes. Okay, the government has the burden to prove that defense. They

offered no evidence on '94; no evidence on '95. Under Celotex, when the government has the burden to prove its defense, and the movant has moved for summary judgment—

Judge Dyk:

Have they offered evidence on '96?

L. Miller:

I'm going to get to '96 Your Honor. So in '94-'95 they're gone. '96, what did the government do? What are the facts as to 1996? It is in the record, that the, and the court can take judicial notice in the briefs as well, that the appropriation was increased in 1994 by 88 million dollars, the appropriation was increased in 1995 by over 50 million dollars. The significance of that is that the appropriation, lump sum in kind, not restricted in any way, could have been used to pay the million, two million dollars that was owed this contractor to carry out this government contract without reducing one penny of any ongoing program serving any other tribe.

Judge Dyk:

How do we know? How do we know?

L. Miller:

Because it was new money Your Honor.

Judge Dyk:

Well how do we know that? Where does the record tell us [inaudible].

L. Miller:

It's in the record, in the, in the Addendum to the brief is the appropriation, the lump sum appropriation for 1993, appears in the briefs

Judge Clevenger:

'93?

L. Miller:

On page 49. And that appropriation for the Indian Health Service was 1,537,000,000 dollars. The appropriation for 1994 is in the Addendum on page 65 and the appropriation there was 1,526,000,000 dollars, and the appropriation for the Indian Health Service for 1996 appears on page 65, excuse me, the middle one was 57.

Judge Clevenger:

Those are the billion dollar sums?

L. Miller:

Those are the lump sum appropriations.

Judge Clevenger:

In the billions?

L. Miller:

Yes Your Honor, that were legally available.

Judge Clevenger:

Yeah, we got that.

L. Miller:

So one only has to do the math from one appropriation to the next to see how much in new appropriations were made by Congress to this Agency to meet its obligations, including mandatory obligations.

Judge Dyk:

How do we know that those funds weren't obligated under contract to other tribes? Now, you can talk all you want to about the size of the appropriation, but unless we know that those funds were available to be reprogrammed, we don't know whether your point has merit or doesn't have merit.

L. Miller:

My, my point to Your Honor, is that although we certainly will provide the briefing, the burden was on the government, not on us. It wasn't on us to disprove their

defense, it was on the government to prove their defense. Number 1, there were new—

Judge Clevenger:

In other words, this case should turn on the burden of proof? That's what you want us to do?

L. Miller:

Well, the government does have a burden. It didn't meet its burden, that's what the Board ruled below. But, let me take us beyond that. Let's look at the government's proof. I mean, I think that's the only thing the Board, the Court can do, is look at the government's proof in the context of the summary judgment which they lost. The government's proof, number 1 about the increased appropriations. Then there is, of course, the left-over balances from the President's Budget, we know left-over balances of up to 76 million dollars in 1996.

Judge Clevenger:

That's not in the record either, right?

L. Miller:

The Court can take judicial notice of the President's budget to the Congress

Judge Dyk:

It's not in the record, is it?

L. Miller:

Pardon me.

Judge Clevenger:

It's not in the record.

L. Miller:

It's not in the record. No, Your Honor, we didn't know it at the time of the briefmg before the Board in 1998, but the Court must take judicial notice under Rule 201(d) of a document like the President's budget request. But, Number 3, let's just look at the proof and the statute. I'd

like to go back to the beginning of the government's presentation. They said the issue presented is the proper interpretation of the notwithstanding clause. Now we agree with that. How do you interpret the notwithstanding clause? Well there is one rule of interpretation that trumps every other rule this Court might apply. It's the rule that's in the statute, and in the statute section l(a)(2) of 450(l)(c) says "every provision of this' Act shall be liberally construed in favor of the contractor." That's a mandatory rule of construction. This notwithstanding clause that has an availability provision and a reduction provision must be construed liberally in favor of the contractor because Congress has so directed. Now, we've talked about the availability clause this morning. The government has conceded there is no cap and their concession is correct under Firefighters.

Judge Clevenger:

But isn't the government saying that section 314 converts the 7.5 and the committee marks into caps?

L. Miller:

That's exactly what the government says. The government says section 314 retroactively converts what was a lump sum appropriation into a capped appropriation, and under Winstar that's something the government cannot do. That is not a general act of Congress regulating its economic affairs, it's a specific repudiation of a contract.

Judge Clevenger:

How do we know that your contract rights vested?

L. Miller:

We know our contract rights vested because'—

Judge Clevenger:

That hasn't' been adjudicated, right? The Winstar issue hasn't been adjudicated at all with the Contract Board.

L. Miller:

Well, the Winstar plaintiffs didn't have to have a court ruling that good will was part of the value of their contract in order for good will to keep.

Judge Clevenger:

Right, I mean, we can't award a victory to you on Winstar, can we? We have to remand.

L. Miller:

I think—

Judge Clevenger:

If your contract rights didn't vest, then you sit down, you have no Winstar claim, right?

L. Miller:

Of course Your Honor. If the contract right—

Judge Clevenger:

So, assuming that 314 is retroactive, and assume that it converts noncaps into caps, then your victory has to be won on the fact that your contracts rights vested.

L. Miller:

Correct Your Honor.

Judge Clevenger:

And there's an argument about that and this isn't a trial court, that's a question of fact whether the contract law vested, whether the rights vested, isn't it?

L. Miller:

Well if Your Honors do remand the case, the Board below found that the contract rights had vested.

Judge Clevenger:

They did?

L. Miller:

If Your Honors disagree and remand the case, the Board below ruled that the contract rights had vested.

Judge Clevenger:

Where did they rule rule that? I don't recall that, but I, perhaps I'm wrong.

L. Miller:

The Board ruled that based on its opinion in Alamo, which it incorporated by reference, that a contract right contingent on the availability of appropriations vests once the appropriation is enacted by Congress, so long as Congress hasn't restricted the appropriation, not an appropriations committee, but Congress, so long as Congress hasn't restricted the use of the appropriation. Which, of course, is what makes this case so different from Oglala, which was another case the government relies upon heavily.

Judge Clevenger:

So your argument is that if we, if we decide in your favor on the availability issue, that automatically decides the vesting issue.

L. Miller:

I think that's correct Your Honor. That is correct.

Judge Clevenger:

And your contracts themselves did provide for, what was it, quarterly payments, something to that effect, each contract had specific terms.

L. Miller:

They had different terms. The original contract provided for quarterly payments. Then there was an addendum to the contract that provided for an up-front annual payment and Congress in 1994 provided for up-front annual payments, then their was an appropriations act provision that we cite in the brief that said all payments are deemed obligated at the time of the contract award.

Judge Clevenger:

If you come back to the hypothetical that I was framing that perhaps is inartful because I don't know as much about the workings of these programs as you and, and the government counsel. In my billion dollar hypothetical, you've agreed that if the Secretary had pledged off by contract 2 billion dollars worth of expenses, then you'd have to wait in line until some later period of time because the Secretary does have the discretion to rank who's going to get paid first?

L. Miller:

Ah, the

Judge Clevenger:

So, if that's so—

L. Miller:

I agree that the government has some discretion. I think the D.C. Circuit in the Ramah School Board case articulated the kind of discretion the government has.

Judge Clevenger:

So it does become very important for us in deciding your case to know, yes or no, whether there were funds that could have been paid to you non-pledged out [inaudible] funds.

L. Miller:

Right. A couple of points that I'd—

Judge Clevenger:

I think it would be useful if our request for additional briefing were honored, if both sides would give us within a week your best arguments on that point. Excuse me.

Judge Dyk:

10 days.

Judge Clevenger:

10 days.

Judge Dyk:
and 10 pages.

Judge Clevenger:
10 pages?

L. Miller:
Thank you, thank you Your Honor.

Judge Schall:
And if you make the charts

Judge Clevenger:
Within 10 pages.

Judge Schall:
And make sure that the charts are very clear and that there's no ambiguities or uncertainties, just really clearly trace it.

L. Miller:
Right. It's actually easily secured Your Honor, in the budget request that the Indian Health Service makes to Congress, it says this. So we will furnish those documents to you and Your Honors can make a de—

Judge Clevenger:
Well, well the reason why I and my panel would like some specificity here is it's hardly clear when you read the Ninth and the Tenth Circuit opinions that they really had a grasp on this exact issue, and certainly the feel in those cases is that the, that the courts felt that there were caps in the hundreds of millions dealing with continuing contracts and 7.5 with new or expanded and that, and that the money was gone

L. Miller:
Right.

Judge Clevenger:
within that cap site. So I don't know that there was ever any real focus on the question of whether if you blow off the caps, either as a result of rejecting 314 or directly, you still need to know is there money available.

L. Miller:
There is one aspect of the case, the government said it supports the Tenth Circuit, but it also said, Your Honor read back the concession in the briefs regarding the caps on new contract support costs. I just did want to take a moment to tell the court, the Tenth Circuit said that the Firefighters decision, which is a Comptroller General's decision which relied, which interpreted the ["]shall remain available["] language as not being a cap, that the Firefighters decision somehow didn't apply, it wasn't convinced that it applied. Two things about this: Number 1, the Firefighters decision involved this precise question: is ["]shall remain available["] language capping language, and ruled that it isn't. I guess three issues, three points. Number 2, the General Accounting Office treatise, the three-volume treatise, embraces that decision on page 6-8, Volume 6, page 8, of the General Accounting Office treatise embraces the Firefighters decision; and Number 3, the place where the GAO embraces the Firefighters decision is the same page that the Tenth Circuit cited to when it was discussing a different family of appropriations terms of art ["]shall be available,["] and I can understand the Circuit overseeing this, not not seeing this, because the citation to the Firefighters opinion was by case number, and not by name. But I wanted the court to appreciate the error and the embracing by the General Accounting Office of the Comptroller General opinion. My time is out, I don't know how much additional—

Judge Clevenger:

Thank you very much for your argument. Ms. Lee. You have your full three minutes if you need it.

J. Lee:

Well unless the court has further questions for me, I would just submit on our briefs and address the point that you raised in the—

Judge Clevenger:

Right, and you understand the, the, what we wanted by way of additional briefing?

J. Lee:

You would like to have a brief addressing the question of whether or not there are actually any funds left over in each one of these fiscal—

Judge Clevenger:

not otherwise pledged to contract obligations, right?

J. Lee:

that were not otherwise pledged, within 10 days of today and you said limited to 10 pages?

Judge Clevenger:

10 days and 10 pages.

Judge Dyk:

It's not a question, it's not limited to the question whether there were funds left over at the end of the year. The question is were there funds that the Secretary could have used to satisfy these contract obligations' that were not obligated under contracts with other tribes or otherwise restricted by the appropriations legislation.

J. Lee:

Alright. Thank you Your Honor for that clarification.

Judge Clevenger:

Thanks to both sides for the arguments.

[See JA Vol. II, PART 2 for Attachments 3-6]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 02-1286

TOMMY G. THOMPSON, Secretary of Health and Human Services,

Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,

Appellee.

APPEAL FROM THE DEPARTMENT OF INTERIOR BOARD OF CONTRACT APPEALS IN NOS. 3877-3879/89 ADMINISTRATIVE JUDGE BERNARD V. PARRETTE

SUPPLMENTAL BRIEF OF APPELLANT TOMMY G. THOMPSON

ROBERT D. McCALLUM, JR.
Assistant Attorney General
BARBARA C. BIDDLE
(202) 514-2541

JEFFRICA JENKINS LEE
(202) 514-2541
Attorneys, Appellate Staff
Civil Division, Room 9546
Department of Justice
601 D St., N.W.
Washington, D.C. 20530-0001
Attorneys for Appellant
April 24, 2003

TABLE OF CONTENTS

	Page
INTRODUCTION	1
A. Congressional Appropriations and IHS Expenditures	1
B. The Authority to Obligate Appropriations From the Relevant Fiscal Years Has Now Lapsed; Consequently, Cherokee's Claim for Additional CSC Funding for FYs 1994-1996 Is Moot.	6
CONCLUSION	8
CERTIFICATE OF SERVICE	
ADDENDUM	

TABLE OF AUTHORITIES

Cases:	Page
Cherokee Nation v. Thompson, 311 F.3d 1054 (10th Cir. 2002), petition for cert. filed, No. 02-1472 (U.S. April 3. 2003)	5
City of Houston v. HUD, 24 F.3d 1421 (D.C. Cir. 1994)	6, 7
National Association of Regional Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977)	7
OPM v. Richmond, 496 U.S. 414 (1990)	7
Rochester Pure Waters District v. EPA, 960 F.2d 180 (D.C. Cir. 1992)	7
West Va. Ass'n of Community Health Ctrs. v. Heckler, 734 F.2d 1570 (D.C. Cir. 1984)	6, 7
Constitution:	
United States Constitution:	
Art. I. § 9. Cl. 7	7
Statutes:	
25 U.S.C. § 450j-l(b)	4
25 U.S.C. § 1621f(a)	3
25 U.S.C. § 1642(a)	3
31 U.S.C. § 1301(c)(2)	6
31 U.S.C. § 1501	2
31 U.S.C. § 1535	3
31 U.S.C. § 1536	3
31 U.S.C. § 1552(a)	3
31 U.S.C. § 1553	3
42 U.S.C. § 1395qq	3
42 U.S.C. § 1396j	3

TABLE OF AUTHORITIES

	Page
Department of the Interior and Related Agencies Appropriations Act. 1994, Pub. L. No. 103-138, § 304, 107 Stat. 1415 (1993)	6
Department of the Interior and Related Agencies Appropriations Act. 1995, Pub. L. No. 103-332, § 304, 108 Stat. 2536 (1994)	6
Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 304, 110 Stat. 1321-196 (1996)	6

INTRODUCTION

This appeal involves a dispute over the amount of funding the Cherokee Nation (Cherokee) received from the Indian Health Service (IHS) for its contract support (*i.e.* administrative) costs associated with the Tribe's operation of various programs and services pursuant to contracts under the Indian Self-Determination and Education Assistance Act, in fiscal years 1994-1996. Oral argument was heard on April 9, 2003, before Judges Clevenger, Schall, and Dyk. During argument, the question was raised whether there were funds leftover in IHS's budget during the relevant fiscal years, and the Court directed the parties to simultaneously submit supplemental briefs addressing whether IHS had any unobligated appropriated funds that could be used to pay Cherokee's full CSC need, without IHS violating its contractual obligations to other tribes. The IHS now files this supplemental brief in accordance with the Court's request.

A. Congressional Appropriations and IHS Expenditures.

As discussed in our reply brief (at 15-19), the Secretary argued before the Board that IHS's lump sum appropriations were insufficient to pay Cherokee and all the other self-determination contractors on the queue, without requiring IHS to reprogram funds it had already obligated to other self-determination contractors, or to reduce funds from programs serving other non-contracting tribes. In support of these arguments, the Secretary proffered the declaration of Carl Fitzpatrick, then IHS's Director of Financial Management, which stated that IHS obligated all of the funds provided by Congress in the FY 1996 appropriation, "with the exception of some minor unobligated sums." Fitzpatrick Decl. ¶3 (JA Vol. II at 474). Mr. Fitzpatrick stated that IHS had $1,406,176 million[1] unobligated from its "Indian Health

[1] As on shown on Table 3-FY 1996 (*infra*, at Supp. Br. Add. 5a), it appears that there was a smaller unobligated balance of $1,253,280.64 in

Services" appropriation at the end of FY 1996, which was used to satisfy expenses that had been incurred during the course of the fiscal year and that were chargeable to the FY 1996 appropriation account. *Id.* at ¶ 25-27 (JA Vol. II at 482-83). The Secretary stated that he intended to proffer similar evidence with respect to fiscal years 1994 and 1995, if given the opportunity to do so by the Board. But the Board refused to conduct an evidentiary hearing (J.A. Vol. I at 27).

In response to the Court's inquiry at oral argument, IHS has reviewed its consolidated financial reports covering the annual (one-year) appropriations for the fiscal years at issue, in particular the Report on Budget Execution, Standard Form 133 (SF 133).[2] The SF 133 presents a "snapshot" of IHS's budgetary resources, obligations and expenditures at a given

---

FY 96. Mr. Fitzpatrick also stated that the appropriation for contract support costs was filly distributed in each of the relevant fiscal years. Fitzpatrick Decl. ¶¶ 6-8 (JA Vol. II at 426). IHS's investigation now indicates that there may have been a very small unobligated CSC balance in FY 1996. It thus appears that the record may need clarification as to whether Mr. Fitzpatrick's statement that the funds were "distributed" meant that they were in fact "obligated." *See* 31 U.S.C. § 1501 (setting forth criteria to record obligations). As noted above, the Board refused to consider the factual availability of appropriations to satisfy Cherokee's request, instead focusing upon whether appropriations were "legally available." *See* JA Vol. I at 27. If the Court believes that these factual issues are relevant (but see Point B., infra), a limited remand to the Board might be appropriate to permit clarification of the record in this regard.

[2] The SF 133's for the one-year appropriations placed into IHS's Indian Health Services Treasury Account numbers 75 4 0390, 75 5 0390 and 75 6 090, as of September 30 for fiscal years 1994-1996, are reproduced in the addendum to this brief, along with the declaration of John A. Thompson, HHS's Chief of the Reports and Control Branch, Division of Financial Operations, Programs Support Center, which attests to the authenticity of these documents. Supp. Br. Add. 2a, 4a, 6a-10a.

time during a fiscal year.[3] As is pertinent here, the SF 133's reveal unobligated balances as of September 30 (the close of the fiscal year), of $6,841,390.01, $3,245,545.71, and $1,253,280.64, in 1994, 1995, and 1996, respectively. *See Congressional Appropriations and IHS Expenditures*, Table 1-FY 1994; Table 2-FY 1995; Table 3-FY 1996.[4] Supp. Br. Add. la, 3a, 5a.

Although it appears that there were some unobligated balances in the overall Indian Health Services account during each fiscal year, those amounts-ranging between $1.2 and $6.8 million-accounted for a very small percentage of IHS's

---

[3] The funds available in IHS's Treasury accounts fluctuate during the course of the fiscal year due not only to its outlays and disbursements, but also because of reimbursements that IHS receives from the Medicare and Medicaid programs, and from collections it receives from other federal agencies under agreements between IHS and those agencies. *See* 42 U.S.C. §§ 1395qq, 1396j; 31 U.S.C. § 1535. In fact, because IHS receives revenues from these other sources, it may actually obligate and disburse more funds in a given fiscal year than it is appropriated by Congress. However, the funds from these other income sources cannot be reprogrammed to pay CSC. *See* 42 U.S.C. § 1395qq (Medicare funds must be used to comply with Medicare participation requirements); 25 U.S.C. § 1642(a) (Medicaid funds must be used to comply with Medicaid participation requirements); 25 U.S.C. § 1621f(a) (reimbursements from third party insurance earned by IHS must be credited to the IHS and used for the provision of services); 31 U.S.C. § 1536 (Economy Act credits to be used to provide additional services absent statutory authorization). Moreover, after the close of a fiscal year, IHS has five years to make adjustments to satisfy expenses that were incurred during the course of the fiscal year, and that were chargeable to that fiscal year's appropriation account; to account for funds that were deobligated during the fiscal year; and to correct accounting errors. 31 U.S.C. §§ 1552(a), 1553. For this reason, the President's Budget and IHS Budget Justification documents relied on by Cherokee are not helpful in response to the Court's question. *See e.g.*, Appellee's Br. 17 n. 35

[4] For the convenience of the Court, these tables summarize IHS's Indian Health Services expenditures as of the close of the each of the fiscal years at issue.

total budgetary resources, which ranged between approximately $1.3 and $1.38 billion, and result from imperfections in the spending process.[5] Further, as the SF 133's show, a portion of IHS's total budgetary resources were attributable to reimbursements and collections that were not available for payment of CSC.[6] Moreover, the unobligated funds were not sufficient to pay Cherokee and all of the other tribal contractors their full CSC need. Indeed, as the documents relied upon by Cherokee show, at the end of FY 1995, there was a CSC funding shortfall of $21.9 million, with 70 tribal contractors remaining on the ISD queue. And at the close of FY 1996, there was a $42.1 million shortfall, with 104 tribal contractors on the queue. *See* DHHS, IHS, Justification of Estimates for Appropriations Committees, IHS-117 (FY 1998).

As we have argued, Cherokee cites no authority, and indeed there is none, for Cherokee's claim that it was entitled to full immediate payment of its CSC need at the beginning of each fiscal year, ahead of all of IHS's other obligations. *See Cherokee Nation v. Thompson*, 311 F.3d 1054, 1063 & n.7 (10th Cir. 2002), *petition for cert. filed*, No. 02-1472 (U.S. April 3, 2003) (there is no support for the tribes' claim to a superior right to payment, "nor would that make sense, given the structure of the compacts plaintiffs have with the government, as well as the IHS' numerous other mandatory financial obligations"). Moreover, as we demonstrate below, Cherokee's claim of entitlement to additional payment from

[5] As explained earlier (*see* n. 3, *supra*), there is also a five-year "adjustment" period during which the unobligated balances may fluctuate.

[6] IHS's duty to provide CSC is conditioned on the availability of appropriated funds, 25 U.S.C. § 450j-l(b), and not on the happenstance that the facilities IHS operates to serve non-contracting tribes might earn income from the medical services that they provide to American Indians and Alaska Natives. As noted earlier (*supra*, n.3), the funds from these other income sources cannot be transferred or reprogrammed to pay CSC.

the Indian Health Services appropriations in the relevant fiscal years is moot because the appropriations for those years are no longer available.

B. The Authority to Obligate Appropriations From the Relevant Fiscal Years Has Now Lapsed; Consequently, Cherokee's Claim for Additional CSC Funding for FYs 1994-1996 Is Moot.

In any event, while it appears that IHS had some unobligated appropriation balances remaining at the close of each of the fiscal years at issue, the appropriations for Indian Health Services were "one-year" appropriations, which have now lapsed. *See* Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, § 304, 107 Stat. 1415 (1993); Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, § 304, 108 Stat. 2536 (1994); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 304, 110 Stat. 1321-196 (1996). Thus, those funds are not now available to pay Cherokee (or any other tribes) any additional CSC. 31 U.S.C. § 1301 (c)(2) (an annual appropriation generally may not be construed to be available beyond the specific year of the appropriation unless the appropriation "expressly provides that it is available after the fiscal year covered by the law in which it appears"). *See also City of Houston v. HUD*, 24 F.3d 1421 (D.C. Cir. 1994). As the D.C. Circuit has explained, "'it is an elementary principle of the budget process that, in general, a federal agency's budgetary authority lapses on the last day of the period for which the funds were obligated. At that point, the unobligated funds revert back into the general Treasury.'" *City of Houston*, 24 F.3d at 1426 (quoting *West Va. Ass'n of Community Health Ctrs. v. Heckler*, 734 F.2d 1570, 1576 (D.C. Cir. 1984)). Moreover, "'a federal court cannot order the obligation of funds for which there is no appropriation.'" *Id.* (quoting *Rochester Pure Waters Dist. v. EPA*, 960 F.2d

180, 184 (D.C. Cir. 1992)). Thus, where, as in this case, 'the relevant appropriation has lapsed or been fully obligated . . . the federal courts are without authority to provide monetary relief." *Id.* at 1428.

The D.C. Circuit's decision in *City of Houston* was premised on the constitutionally-based doctrine that Congress, and Congress alone, has the power to direct the expenditure of funds from the Treasury. 24 F.3d at 1428. *See* Art. I, § 9, C1. 7 ("[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . "). The command of the Appropriations Clause is "straightforward and explicit," it "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *OPM v. Richmond*, 496 U.S. 414, 424 (1990) (internal quotation marks and citation omitted).

Cherokee's appeal to the Interior Board of Contract Appeals was not filed until January 27, 1998—well after the close of each of the fiscal years at issue. Its claim of entitlement to any additional CSC funding from the Indian Health Services appropriation for those years is therefore moot. *National Ass'n of Regional Councils v. Costle*, 564 F.2d 583, 588-89 (D.C. Cir. 1977) ("If. . . .budget authority has lapsed before suit is brought . . ., any order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorization in the Congress. Equity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities."). Because Congress never provided budget authority to pay CSC claims from any source other than the relevant year appropriations, this Court may not order monetary relief in this case.

CONCLUSION

For the foregoing reasons, as well as those urged in our main briefs and at oral argument, the Board's order granting summary judgment in favor of Cherokee should be reversed by this Court.

Respectfully submitted,

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

BARBARA C. BIDDLE
(202) 514-2541

JEFFRICA JENKINS LEE
(202) 514-5091
Attorneys, Appellate Staff
Civil Division, Room 9546
Department of Justice
601 D St., N. W.
Washington, D. C. 20530-0001

APRIL 24, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April 2003, I caused to be filed copies of the foregoing "Supplemental Brief of Appellant Tommy G. Thompson" with the Clerk, United States Court of Appeals for the Federal Circuit, and served the following counsel by causing copies to be dispatched in the following manner:

LLOYD BENTON MILLER, ESQUIRE
MELANIE B. OSBORNE, ESQUIRE
SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON
900 W. Fifth Ave., Suite 700
Anchorage, AK 99501
(via Federal Express delivery service)

/s/ Jeffrica Jenkins Lee
JEFFRICA JENKINS LEE
Attorney for the Appellant

[See JA Vol. II, PART 2 for Addendum]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 02-1286

TOMMY G. THOMPSON, Secretary of Health and Human Services,
Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,
Appellee.

APPEAL FROM THE DEPARTMENT OF INTERIOR BOARD OF CONTRACT APPEALS IN NOS. 3877-3879/89 ADMINISTRATIVE JUDGE BERNARD V. PARRETTE

REVISED SUPPLMENTAL BRIEF OF APPELLANT TOMMY G. THOMPSON

ROBERT D. MCCALLUM, JR.
Assistant Attorney General
BARBARA C. BIDDLE
(202) 514-2541

JEFFRICA JENKINS LEE
(202) 514-5091
Attorneys, Appellate Staff
Civil Division, Room 9546
Department of Justice
601 D St., N.W.
Washington D.C. 20530-0001
Attorneys for Appellant
May 12, 2003

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	3
1. Program Description	3
2. IHS's Allocations in Fiscal Years 1994, 1995, and 1996	5
3. Mootness	9
CONCLUSION	10
CERTIFICATE OF SERVICE	
ADDENDUM	

TABLE OF AUTHORITIES

Cases:	Page
Cherokee Nation v. Thompson, 311 F.3d 1054 (10th Cir. 2002), petition for cert. filed, No. 02-1472 (U.S. April 3, 2003)	3
City of Houston v. HUD, 24 F.3d 142 (D.C. Cir. 1994)	9
National Association of Regional Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977)	9
OPM v. Richmond, 496 U.S. 414 (1990)	9
Shoshone-Bannock Tribes v. Thompson, 279 F.3d 660 (9th Cir. 2002)	3
United States Constitution:	
Appropriations Clause: Art. I, § 9, Cl. 7	9
Statutes:	
Indian Health Care Improvement Act: 25 U.S.C. § 1601	4
Indian Self-Determination and Education Assistance Act:	
25 U.S.C. § 450j-l(a)(l)	4
25 U.S.C. § 450j-l(b)	2, 8
25 U.S.C; § 450j-l(b)(2)	9
25 U.S.C. § 450j(g)	9
25 U.S.C. § 450j(i)	9
25 U.S.C. § 458aaa-l8(b)	2
Snyder Act:	
25 U.S.C. § 13	4
31 U.S.C. § 1301(c)(2)	10
31 U.S.C. § 1501	9
31 U.S.C. § 1552(a)	9
31 U.S.C. § 1553	9

Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993) 7
Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, § 304, 107 Stat. 1415 (1993) 9
Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499 (1994) 6
Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, § 304, 108 Stat. 2536 (1994) 7, 10
Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy That Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, 109 Stat. 194, 248, § 2007(a) (1995) 7
Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681 (1998)... 3
Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189, 1321-380, § 31002(a) (1996) 7
Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 304, 110 Stat. 1321-196 (1996) 10
Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681 (1998)... 3

Legislative Materials:

H.R. Rep. No. 103-158 (1993) 3
H.R. Rep. No. 103-551 (1994) 3
H.R. Rep. No. 104-173 (1995) 3

INTRODUCTION

The Secretary submits this revised supplemental brief in accordance with this Court's order of April 28, 2003, to directly address:

> the amount of funds available during each of the fiscal years 1994, 1995, and 1996 (over and above the amounts not expended by the end of the fiscal year) that were not obligated to other tribes or otherwise restricted and thus could have been used (by reprogramming) to satisfy obligations under the agreements in question here during those fiscal years.

As we discuss below, IHS has examined its financial reports pertaining to the fiscal years at issue, which show that Hopper Decl. ¶ 4 (Rev. Supp. Br. Add. 2a):[1]

> At the beginning of each fiscal year [1994, 1995, and 1996], IHS obligated all of the funds that Congress provided in its lump-sum appropriations for those years, with the exception of some minor unobligated sums. The entire annual lump-sum appropriation for each of these fiscal years, *i.e.*, both the obligated and unobligated funds, was allocated for programs that serve Tribes, either through self-determination contracts or directly for the operation of Tribal programs by IHS.

---

[1] In response to the Court's direction, IHS's current Director of Financial Management, Lovell Hopper, and his staff, examined IHS's financial records and prepared tables summarizing IHS's allocations of its lump sum appropriations for the relevant fiscal years. For the Court's convenience, Mr. Hopper's declaration explaining IHS's allocations, with accompanying tables (Ex. 1), is included in the addendum to this brief. Rev. Supp. Br. Add. 1a-68a. The other exhibits referred to in the declaration as source documentation for the tables are not included at this time due to their bulk (approximately 800 pages); however the Secretary is serving Cherokee counsel's with a copy of the exhibits. If the Court wishes, the Secretary will also provide the Court with copies of these exhibits. In light of the factual nature of this evidence, the Court might find that a limited remand to the Board is necessary.

Thus, as the Hopper declaration and accompanying tables show, there were no funds available during each of the fiscal years 1994, 1995, and 1996, "that were not obligated to other tribes or otherwise restricted and thus could have been used (by reprogramming) to satisfy obligations under the agreements in question here during those fiscal years" (Order of 4/28/03 at 1-2), without the Secretary violating his statutory duty to not take away funding from programs serving other tribes. *See* 25 U.S.C. § 450j-l(b) (""Notwithstanding any other provision of this subchapter. . . the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization") (emphasis added); *see also id.* at 458aaa-l8(b).

This Court should thus join the Ninth and Tenth Circuits in holding that the Secretary was not required to reallocate funds from IHS's over $1 billion lump sum annual appropriations to fund contract support costs (CSC) beyond the amounts Congress indicated - both initially,[2] and later in Section 314[3] - should be spent on this category of expenses. *See Shoshone-Bannock Tribes v. Thompson*, 279 F.3d 660, (9th Cir. 2002); *Cherokee Nation v. Thompson*, 311 F.3d 1054 (10th Cir. 2002), petition for cert. filed, No. 02-1472 (U.S. April 3, 2003). As noted in our earlier briefing, the Board denied the Secretary's request for an evidentiary hearing to present evidence detailing how IHS's annual lump sum appropriations were allocated. Because this Court's request for supplemental briefing requires the Secretary's to now provide

[2] *See* H.R. Rep. No. 103-158 at 100, 104 (1993) (recommending $134,686,000 for CSC for ongoing contracts for FY 1994); H.R. Rep. No. 103-551 at 103 (1994) (recommending $145,738,000 for ongoing CSC for FY 1995); H.R. Rep No. 104-173 at 97 (1995) (recommending $153,040,000 for ongoing CSC for FY 1996).

[3] Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 314, 112 Stat. 2681, 2681-288 (1998).

such details, as noted earlier (*supra* n. 1), the Court might find it appropriate to order a limited remand to the Board to permit supplementation and clarification of the record. *But see* Point 3 *infra*.

ARGUMENT

1. *Program Description.*

A brief discussion of the operation of the Indian Health Service (IHS) is helpful in addressing the Court's question. As noted in our main brief (at 6), IHS either directly operates, or enters into self-determination contracts with tribes to operate, approximately 150 health care delivery programs (service units) serving defined geographic areas across the country.[4] Pursuant to the Indian Self-Determination and Education Assistance Act (ISDEA), the Secretary is required to provide funding under self-determination contracts in the same amount that he would have provided if the programs were directly operated by IHS (*i.e.*, the Secretarial amount). *See* 25 U.S.C. § 450j-1 (a)(1).

In addition to its direct care operations, IHS has two levels of administration: (1) IHS Headquarters in Rockville, Maryland; and (2) IHS's regional administration, which is geographically divided into twelve "Areas." IHS's administrative components provide administrative support to all IHS health care programs. One tribe cannot contract to take over the entire administrative component at the IHS Area level

[4] IHS derives its authority to provide health care services to American Indians primarily from two statutes. First, the Snyder Act, 25 U.S.C. § 13, authorizes IHS to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians, "for the" relief of distress and conservation of health." *Id.* Second, the Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq.*, establishes numerous programs to implement particular Indian health initiatives concerning, for example, alcohol and substance abuse treatment, diabetes, medical training, and urban Indian health.

unless all the tribes in that geographic area agree, because the component serves all of the tribes in a particular geographic area. Similarly, the Headquarters administrative support component serves all the tribes across the nation. Thus, the tribe assumes only the portion or "share" of the administrative component that supports the particular service unit program for which the tribe has contracted. The portion of the Area and Headquarters administrative functions that a tribal organization is entitled to operate is referred to as the "tribal share." Accordingly, the "Secretarial amount" in a given contract includes funds for both the specific service-unit-level health care delivery program for which the tribe has contracted, as well as any associated tribal share-*i.e.*, administrative functions at the Area and/or Headquarters Offices that support the contracted service unit program for which the tribe wishes to contract.

2. *IHS's Allocations in Fiscal Years 1994, 1995, and 1996.*

As our prior briefs (Opening Br.27-28, 37-38; Reply Br.9, 13,16-17, 25) and Mr. Hopper's declaration (¶¶ 6, 13, 22, 33; Rev. Supp. Br. Add. 3a, 6a, 8a, 11a-12a) explain, the Secretary allocates IHS's annual lump sum appropriation in accordance with Congress's committee report recommendations. During each fiscal year, IHS allocates the majority of its lump sum health services appropriation to Area Offices. Hopper Decl. ¶ 8 (Rev. Supp. Add. 4a). The Area Offices in turn divide the funds between the service unit programs that are directly operated by IHS and the service unit programs that are operated by tribes under contract. In addition, Area Offices retain funds for activities at the Area level for the inherently federal (*i.e.*, non-contractable) functions that IHS must carry out as a federal agency, regardless of whether all IHS programs were under contract with tribes. *Id.* The remaining funds at the Area level are used for the support of service unit programs and are subject to contracting by tribes as each tribe's proportionate share of the area level programs.

Id. IHS Headquarters also retains funds to support inherently federal functions for certain activities that are managed by Headquarters, or for programs that are identified as available for contract as tribal shares. *Id.* at ¶ 10 (Rev. Supp. Br. Add. 5a).

The total annual lump sum appropriation represents the specific amounts that fund the numerous health services and programs that IHS directly or indirectly provides. Specifically, IHS allocates its lump sum appropriation to fund services and programs in the following categories (also referred to as sub-sub activities): Hospitals and Clinics, Dental, Mental Health, Alcohol and Substance Abuse, Public Health Nursing, Health Education, Community Health Representatives, Immunization, Urban Health, Indian Health Professions, Tribal Management, Direct Operations, Self-Governance, and Contract Support Costs. Hopper Decl. ¶ 5 (Rev. Supp. Br. Add. 2a-3a).

IHS's total congressional appropriations for Indian health services in fiscal years 1994, 1995, and 1996 were $1,645,877,000,[5] $1,707,092,000,[6] and $1,745,309,000,[7] respectively. Minus the amounts earmarked in the appropriations acts, IHS's total available health services appropriation was $1,288,529,000 for 1994, $1,337,042,218 for 1995, and $1,375,245,000 for 1996. As the Hopper

---

[5] *See* Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993);

[6] *See* Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2527-28 (1994); Pub. L. No. 103-332,108 Stat. 2537, 2538, § 313; Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy That Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, 109 Stat. 194, 248, § 2007(a) (1995).

[7] *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189, 1321-380, § 31002(a) (1996).

declaration and supporting tables detail, the entire appropriation for each fiscal year was fully allocated:

- In the 1994 fiscal year, IHS allocated, through the Area Offices and Headquarters combined, $520,445,098 to tribal service units, and $491,953,477 to federal programs serving tribes. In addition, $25,522,460 was retained for inherently federal functions, and $250,607,965 was retained to be available for tribal shares (Hopper Decl. ¶¶ 16-20; Ex. 1). Rev. Supp. Br. Add. 7a, 15a- 17a.
- In the 1995 fiscal year, IHS allocated through the Area Offices and Headquarters combined, $577,186,900 to tribal service units, and $494,361,441 to federal programs serving tribes. In addition, $29,613,574 was retained for inherently federal functions and $235,880,302 was retained to be available for tribal shares (Hopper Decl. ¶¶ 27-31; Ex. 1). Rev. Supp. Br. Add. 10a-11a, 15a-17a.
- In the 1996 fiscal year, IHS allocated, through the Area Offices and Headquarters combined, $616,188,464 to tribal service units and $507,104,763 to federal programs serving tribes. In addition, $35,989,621 was retained for inherently federal functions and $215,962,152 was retained to be available for tribal shares (Hopper Decl. ¶¶ 38-42; Ex. 1). Rev. Supp. Br. Add. 13a-l4a, 15a-17a.

Thus "the entire annual lump-sum appropriation for each of these fiscal years, *i.e.*, both the obligated and unobligated funds, was allocated for programs that serve Tribes, either through self-determination contracts or directly for the operation of Tribal programs by IHS." Hopper Decl. ¶ 4 (Rev. Supp. Br. Add. 2a). Further, the amounts retained (residuals) for the administration of inherently federal functions ($25,522,460 in FY 1994, $29,613,574 in FY 1995, and $35,989,621 in FY 1996) were non-contractable. Nor

were the amounts retained for tribal shares[8] ($250,607,965 in FY 1994, $235,880,302 in FY 1995, and $215,962,152 in FY 1996) available for reprogramming. Hence, IHS could not have reprogrammed funds already allocated to other tribes or programs to pay Cherokee's full CSC request (and those of all the other tribal contractors nationwide), without violating the statutory mandate against reducing funding from programs serving other tribes. *See* 25 U.S.C. § 450j-l(b); *see also id.* at § 450j(g) (the Secretary is prohibited from making "any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals"); *id.* at § 450j-1 (b)(2) (once funds are provided to a tribe under a self-determination contract, they shall not be reduced "in subsequent years"); *id.* at § 450j(i) ("[n]othing in this part shall be construed to limit or reduce in any way the funding for any program, project, or activity serving a tribe under this or other applicable Federal law").

3. *Mootness.*

As indicated in our earlier supplemental brief (at 3-4 & n.3), it appears that some of the funds allocated by IHS during each fiscal year had not been "obligated" (*see* 31 U.S.C. § 1501) by the close of the fiscal year. We explained, however, that the appropriation account remains available for five years for recording, adjusting, and liquidating obligations properly chargeable to that fiscal year appropriation account. *See* 31 U.S.C. §§ 1552(a), 1553.

---

[8] A tribe may contract or compact only its share of these retained funds supporting Headquarters' administrative support functions. Those tribal shares which are contracted or compacted are distributed to the appropriate tribes. However, those tribal shares for tribes served directly by the IHS are retained by Headquarters to fund administrative support services for those Tribes, and may not be reprogrammed for other tribes.

Moreover, as we discussed further (Supp. Br. 6-8), the "one-year" appropriations[9] for Indian Health Services for the fiscal years in question have now lapsed and there is, therefore, no source of funds available to pay Cherokee's claim. 31 U.S.C. § 1301(c)(2); *see also City of Houston v. HUD*, 24 F.3d 142,14261 (D.C. Cir. 1994). Indeed Congress, exclusively, has the power to direct the expenditure of funds from the Treasury. *See* Art. I, § 9, C1.7 ("[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."); *see also OPM v. Richmond*, 496 U.S. 414, 424 (1990); *City of Houston*, 24 F.3d at 1428.

Because Cherokee's appeal to the Interior Board of Contract Appeals was not filed until January 27, 1998 - well after the close of each of the fiscal years at issue, its claim of entitlement to any additional CSC funding from the Indian Health Services appropriation for those years is moot. *National Ass 'n of Regional Councils v. Costle*, 564 F.2d 583, 588-89 (D.C. Cir. 1977). As Congress never provided budget authority to pay CSC claims from any source other than the relevant year appropriations, this Court may not order monetary relief in this case.

---

[9] *See* Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, § 304,107 Stat. 1415 (1993); Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, § 304, 108 Stat. 2536 (1994); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 304, 110 Stat. 1321-196 (1996).

CONCLUSION

For the foregoing reasons, as well as those urged in our main and supplemental briefs, and at oral argument, the Board's order granting summary judgment in favor of Cherokee should be reversed by this Court.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

BARBARA C. BIDDLE
(202) 514-2541
JEFFRICA JENKINS LEE
(202) 514-5091
Attorneys, Appellate Staff
Civil Division, Room 9546
Department of Justice
601 D St., N. W.
Washington, D. C. 20530- 0001

MAY 12, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May 2003, I caused to be filed copies of the foregoing "Revised Supplemental Brief of Appellant Tommy G. Thompson" with the Clerk, United States Court of Appeals for the Federal Circuit, and served the following counsel by causing copies to be dispatched in the following manner:

LLOYD BENTON MILLER, ESQUIRE
MELANIE B. OSBORNE, ESQUIRE
SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON
900 W. Fifth Ave., Suite 700
Anchorage, AK 99501
(*via* Federal Express delivery service)

/s/ JEFFRICA JENKINS LEE
JEFFRICA JENKINS LEE
Attorney for the Appellant

Index

Declaration of Lovell Hopper, executed
May 12, 2003,..... 1a
Exhibit 1 ..... 15a

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 02-1286

TOMMY G. THOMPSON, Secretary of Health and Human Services,
Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,
Appellee.

APPEAL FROM THE DEPARTMENT OF INTERIOR BOARD OF CONTRACT APPEALS IN NOS. 3877-3879/89 ADMINISTRATIVE JUDGE BERNARD V. PARRETTE

I, Lovell Hopper, declare as follows:

1. I am currently employed as the Director of the Division of Financial Management ('DFM") for the Indian Health Service ("IHS"). I have been in this position since July 30, 2000. From May 1996 until July 2000, I was employed by IHS as the Director of Financial Management for the Phoenix Area office of the IHS. In my current position as the Director of Financial Management, my primary responsibilities are management and oversight of issues related to budget formulation, budget execution, financial systems, and audit of the Indian Health Service.

2. This declaration is based on my personal knowledge and on information that I obtained in the course of my employ-

ment. In the event that I am called as a witness, I could competently testify to the facts contained in this declaration.

3. The allocation amounts in this declaration are taken from documents that the IHS Division of Financial Management and the Area Office Financial Management Officers keep in the ordinary course of business. At my direction, Headquarters Division of Financial Management staff prepared tables summarizing these allocations which are attached as Exhibit 1. The original documents are also attached as Exhibits 3 through 19.

4. IHS' total appropriations from Congress for Indian health services in fiscal years 1994, 1995, and 1996 were $1,645,877,000, $1,707,092,000, and $1,745,309,000, respectively. At the beginning of each fiscal year IHS obligated all of the funds that Congress provided in its lump-sum appropriations for those years, with the exception of some minor unobligated sums. The entire annual lump-sum appropriation for each of these fiscal years, *i.e.*, both the obligated and unobligated funds, was allocated for programs that serve tribes, either through self-determination contracts or directly for the operation of tribal programs by IHS.

5. The total annual lump sum appropriation is the sum of specific amounts for the many health services and programs that IHS directly or indirectly provides. These services and programs fall into the following categories:

> Hospitals and Clinics, Dental, Mental Health, Alcohol and Substance Abuse, Public Health Nursing ("PHN"), Health Education, Community Health Representatives ("CHR"), Immunization, Urban Health, Indian Health Professions, Tribal Management, Direct Operations, Self-Governance, and Contract Support Costs. These categories are known as sub-sub activities.

6. Before Congress appropriated funding to IHS for these services, it approved them during the budget process as

appropriate purposes for IHS' expenditure of the funding. IHS submitted these proposed services for Congress' review in the so-called Congressional Justifications, by which IHS explains its budget request to Congress prior to the start of the fiscal year. The services were also brought to Congress' attention as a result of being included in the budget that the president submitted to Congress for these fiscal years. Then, when Congress actually appropriated the money requested in the budget, it specifically listed the funding for the various services for which the appropriation was intended by sub-sub activity in its Appropriation Committee Reports.

7. The amounts listed in the Congressional Justifications for IHS' health services are usually less than IHS originally sought. The reason for the reduction is that IHS' funding needs are reviewed and reduced during the budgeting process. IHS submits its original budget request to HHS, which usually reduces it because of competing interests within HHS. HHS, in turn, submits the request to OMB, which usually reduces it further due to competing interests within the government. Finally, the request is incorporated into the President's budget request to Congress, in which IHS' request for funding is set forth in the Congressional Justifications. At that point Congress appropriates only as much money as it sees fit. For example, in 1996, in the Congressional Justification, IHS requested $161,174,000 in contract support costs but ultimately was allocated only $153,040,000. *See* Exh. 2. In other words, IHS cannot request an unlimited amount of funding and reasonably expect ultimately to receive it from Congress.

8. Each year, IHS allocates most of the lump sum appropriation to Area Offices. The Area Offices then divide these funds between the service unit programs that are operated by IHS and the service unit programs that are operated by tribes under contract. Usually, both the federally-operated and tribally-operated service unit programs receive

the same base funding as in prior years, plus their share of any program increases. Area offices also retain funds for activities at the area level that are inherently federal functions IHS needs to carry out as a federal agency even if all IHS programs were to be contracted or compacted by tribes. The rest of the funds at the area level are for support of service unit programs and are subject to contracting or compacting by tribes as each tribe's proportionate share of the area level programs. The funds which are available for contract are known as "tribal shares." Each tribe in the Area, contracting or non-contracting, has an identified tribal share amount that cannot be contracted for by another tribe.

9. During fiscal years 1994 through 1996, most of the self-governance tribes received payment directly from Headquarters, unlike the self-determination tribes who received payment from the Areas. These compact funds had been adviced to the self-governance sub-sub activity from the other program activities, including contract support costs, for payment to the self-governance tribes.

10. IHS Headquarters also retains funds for certain other activities that are managed at the Headquarters level. These funds either support inherently federal functions that are not available for contract, or programs that are identified as available for contract or compact by tribes as tribal shares. Each tribe, contracting or non-contracting, has an identified headquarters tribal share amount, that cannot be contracted for by another tribe.

Fiscal Year 1994

11. In fiscal year 1994, IHS received a total appropriation of $1,645,877,000 for health services. Of this amount, the appropriation act earmarked $337,848,000 for contract health services, $12,000,000 for the catastrophic health emergency fund ("CHEF"), $11,526,000 for the student loan repayment program for medical professionals, and $7,500,000 for the

Indian Self- Determination ("ISD") Fund. *See* Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993).

12. Unlike the other amounts earmarked by the Appropriation Act, the loan repayment earmark was made available for obligation for one year only, and consequently was apportioned, allocated, obligated, and expended in the one-year account along with the balance of the health services appropriation.

13. In the Appropriation Committee Reports, Congress divided the remaining amount, $1,277,003,000, plus the $11,526,000 for loan repayment, by sub-sub activity as follows: $799,363,000 for Hospitals and Clinics, $53,151,000 for Dental, $35,272,000 for Mental Health, $87,617,000 for Alcohol and Substance Abuse, $22,187,000 for PHN, $7,919,000 for Health Education, $43,010,000 for CHR, $1,348,000 for Immunization, $22,834,000 for Urban Health, $27,406,000 for Indian Health Professions (includes $11,526,000 for loan repayment), $5,285,000 for Tribal Management, $49,471,000 for Direct Operations, $4,980,000 for Self-Governance, and $128,686,000 for Contract Support Costs. *See* Exhibit 3.

14. IHS Headquarters allocated all of the $1,288,529,000 either to the Areas or to Headquarters.

15. IHS allocated $1,121,734,778 to the Areas by sub-sub activity as follows: $722,096,145 for Hospitals and Clinics, $51,559,483 for Dental, $32,167,094 for Mental Health, $82,880,325 for Alcohol and Substance Abuse, $21,384,851 for PHN, $7,599,437 for Health Education, $39,807,100 for CHR, $1,348,000 for Immunization, $15,629,225 for Urban Health, $605,400 for Indian Health Professions, $100,000 for Tribal Management, $22,905,188 for Direct Operations, $1,244,460 for Self-Governance, and $122,408,070 for Contract Support Costs. *See* Exhibit 4.

16. The twelve IHS areas in turn allocated all of the $1,121,734,778 that had been allocated to them between tribal contracts, federally operated health service units, and Area Office programs. In fiscal year 1994, the Areas allocated a total of $476,611,818 to tribes and $491,953,477 to federal service units by sub-sub-activity. *See* Exhibits 1 and 5.

17. The Area Offices retained $153,169,483 for area level functions, which either supported inherently federal functions, also known as residual functions, or were available for tribal shares. Some Area Offices had identified the level of funding necessary to carry out residual functions, and had identified the balance as area shares for tribes. Other Areas had not yet established what level of funding was necessary to support residual functions. *See* Exhibits 1, 5, and 6.

18. In fiscal year 1994, IHS allocated $166,794,222 to Headquarters. *See* Exhibits 1 and 4.

19. IHS Headquarters distributed $44,299,755 to tribes and Urban programs by sub-sub activity as follows:

Urban Health: $6,666,075 to urban programs;
Tribal Management: $5,104,485 to tribal programs;
Contract Support Costs: $24,900 to tribal programs;
Self-Governance: $32,594,295 to tribal programs.

See Exhibits 1 and 7.

20. IHS Headquarters divided the remaining $122,494,467 between inherently federal functions and amounts identified for headquarters tribal shares that support area and service unit level programs whether operated by IHS or Tribes. *See* Exhibits 1 and 8.

Fiscal Year 1995

21. In fiscal year 1995, Congress initially appropriated $1,713,052 for health services. Of this amount, $351,258,000 was earmarked for contract health services, $12,000,000 was

earmarked for CHEF, $11,603,000 was earmarked for loan repayment, and $7,500,000 was earmarked for the ISD Fund. *See* Pub. L. No. 103-332, 108 Stat. 2499, 2527-28 (1994).

22. In the Appropriation Committee Reports, Congress divided the remaining amount, $1,318,691,000 plus the $11,603,000 for loan repayment, by sub-sub activity as follows: $825,442,000 for Hospitals and Clinics, $57,628,000 for Dental, $36,518,000 for Mental Health, $91,527,000 for Alcohol and Substance Abuse, $23,550,000 for PHN, $8,260,000 for Health Education, $44,039,000 for CHR, $1,331,000 for Immunization, $23,394,000 for Urban Health, $28,098,000 for Indian Health Professions (includes $11,603,000 for loan repayment), $5,358,000 for Tribal Management, $49,804,000 for Direct Operations, $9,107,000 for Self-Governance, and $138,238,000 for Contract Support Costs. *See* Exhibit 9.

23. After Congress enacted a reduction and a rescission, IHS received a total appropriation of $1,707,092,000 for health services. Of this amount, $350,564,000 was earmarked for contract health services, $12,000,000 was earmarked for CHEF, $11,488,000 was earmarked for loan repayment, and $7,500,000 was earmarked for the ISD Fund. *See* Pub. L. No. 103-332, 108 Stat. 2537, 2538 § 313 (1994); Pub. L. No. 104-19, 109 Stat. 194, 248 § 2007(a)(1995).

24. IHS applied the rescission to the remaining amount, $1,337,042,218, which includes the $11,488,000 for loan repayment, by sub-sub activity as follows: $822,538,000 for Hospitals and Clinics, $57,518,000 for Dental, $36,448,000 for Mental Health, $91,352,000 for Alcohol and Substance Abuse, $23,505,000 for PHN, $8,244,000 for Health Education, $43,955,000 for CHR, $1,329,000 for Immunization, $23,349,000 for Urban Health, $27,479,000 for Indian Health Professions (includes loan repayment), $5,048,000 for Tribal Management, $49,709,000 for Direct Operations, $8,594,000 for Self-Governance, and $137,960,000 for

Contract Support Costs. These amounts are slightly less than the total due to rounding. *See* Exhibits 10 and 11.

25. IHS Headquarters allocated all of the $1,337,042,218 either to the Areas or to IHS Headquarters.

26. IHS allocated $1,026,027,578 to the Areas by sub-sub activity as follows: $687,294,592 for Hospitals and Clinics, $51,411,582 for Dental, $30,096,534 for Mental Health, $75,955,270 for Alcohol and Substance Abuse, $20,892,337 for PHN, $6,663,366 for Health Education, $34,696,489 for CHR, $1,098,058 for Immunization, $15,978,150 for Urban Health, $735,433 for Indian Health Professions, $11,800 for Tribal Management, $21,140,012 for Direct Operations, $93,950 for Self-Governance, and $79,960,005 for Contract Support Costs. *See* Exhibits 1 and 12.

27. The twelve IHS Areas in turn distributed the funds that had been allocated to them for obligation to tribal contracts and use by federally operated health programs. In fiscal year 1995, the Areas distributed $385,655,358 to tribes and $494,361,441 to federal programs by sub-sub activity. *See* Exhibits 1 and 13.

28. The Areas retained $146,969,857 for area level functions, which either supported inherently federal functions, also known as residual functions, or were available for tribal shares. Some Area Offices had identified the level of funding necessary to carry out residual functions, and had identified the balance as area shares for tribes. Other Areas had not yet established what level of funding was necessary to support residual functions. *See* Exhibits 1, 13-14.

29. In fiscal year 1995, IHS allocated $311,014,640 to Headquarters for Headquarters managed activities. *See* Exhibits 1 and 12.

30. IHS Headquarters distributed $191,625,367 to tribes and Urban programs by sub-sub activity as follows:

Urban Health: $6,764,992 to urban programs;
Tribal Management: $5,035,966 to tribal programs;
Contract Support Costs: $320,192 to tribal programs;
Self-Governance: $179,504,217 to tribal programs.

See Exhibits 1 and 15.

IHS Headquarters divided the remaining $119,389,273 between inherently federal functions and amounts identified for headquarters tribal shares that support area and service unit level programs whether operated by IHS or tribes. *See* Exhibits 1 and 16.

Fiscal Year 1996

32. In fiscal year 1996, Congress initially appropriated $1,747,842,000 for IHS for health services, of which the appropriation act earmarked $350,564,000 for contract health services, $12,000,000 for CHEF, $11,306,000 for loan repayment, and $7,500,000 for the ISD Fund. *See* Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996).

33. In the Appropriation Committee reports, Congress divided the remaining amount, $1,366,472,000 plus the $11,306,000 for loan repayment by sub-sub activity as follows: $852,435,000 for Hospitals and Clinics, $59,680,000 for Dental, $37,561,000 for Mental Health, $91,666,000 for Alcohol and Substance Abuse, $24,311,000 for PHN, $8,421,000 for Health Education, $43,958,000 for CHR, $1,328,000 for Immunization, $23,360,000 for Urban Health, $26,271,000 for Indian Health Professions, $2,348,000 for Tribal Management, $49,260,000 for Direct Operations, $9,104,000 for Self-Governance, and $145,540,000 for Contract Support Costs. *See* Exhibit 17.

34. After a rescission, IHS received a total appropriation of $1,745,309 for health services. Of this amount, $350,564,000

was earmarked for contract health services, $12,000,000 was earmarked for CHEF, $11,306,000 was earmarked for loan repayment, and $7,500,000 was earmarked for the ISD Fund. *See* Pub. L. No. 104-134, 110 Stat. 1321-380, § 31002(a) (1996).

35. In its request for apportionment, IHS divided the remaining amount, $1,363,939,000, plus $11,306,000 for loan repayment, by sub-sub activity as follows: $854,478,000 for Hospitals and Clinics, $59,770,000 for Dental, $37,200,000 for Mental Health, $91,352,000 for Alcohol and Substance Abuse, $24,150,000 for PHN, $8,313,000 for Health Education, $43,955,000 for CHR, $1,328,000 for Immunization, $23,768,000 for Urban Health, $26,244,000 for Indian Health Professions, $2,348,000 for Tribal Management, $47,709,000 for Direct Operations, $9,090,000 for Self-Governance, and $145,540,000 for Contract Support Costs. *See* Exhibit 18.

36. IHS Headquarters allocated all of the $1,375,245,000 to the Areas and Headquarters.

37. IHS Headquarters allocated $1,109,395,055 to the Areas by sub-sub activity as follows: $690,248,871 for Hospitals and Clinics, $51,370,796 for Dental, $30,590,839 for Mental Health, $75,952,586 for Alcohol and Substance Abuse, $21,362,682 for PHN, $6,570,553 for Health Education, $34,712,822 for CHR, $918,954 for Immunization, $16,366,850 for Urban Health, $505,330 for Indian Health Professions, $25,600 for Tribal Management, $20,302,201 for Direct Operations, $71,396,152 for Self-Governance, and $89,070,819 for Contract Support Costs. *See* Exhibit 19.

38. The twelve IHS Areas in turn distributed the funds that had been allocated to them to tribal contracts and federally operated health programs. In fiscal year 1996, the Areas

distributed $467,336,098 to tribes and $507,104,763 to federal programs by sub-sub activity. *See* Exhibits 1 and 20.

39. The Areas retained $134,954,194 for area level functions, which either supported inherently federal functions, also known as residual functions, or were available for tribal shares. Some Area Offices had identified the level of funding necessary to carry out residual functions, and had identified the balance as area shares for tribes. Other Areas had not yet established what level of funding was necessary to support residual functions. *See* Exhibits 1, 20, and 21.

40. IHS allocated $265,849,945 to Headquarters for Headquarters managed activities.

41. IHS Headquarters distributed $148,874,208 to tribal and Urban programs by sub-sub activity as follows:

Urban Health: $6,795,850 to urban programs;
Tribal Management: $2,321,225 to tribal programs;
Self-Governance: $139,757,133 to tribal programs.

See Exhibits 1 and 22.

42. IHS Headquarters divided the remaining $116,975,737 between inherently federal functions and headquarters tribal shares that support area and service unit level programs whether operated by IHS or tribes. *See* Exhibits 1 and 23.

Shortfalls in Contract Support Cost Funding
for New and Expanded Programs

43. In its budget justification for fiscal year 1998, IHS reported contract support cost shortfalls from fiscal year 1995 of $21,900,000 in unpaid requests for funding for new and expanded programs in the ISD queue over and above the $7,500,000 appropriated for the ISD Fund; and for fiscal year 1996, IHS reported $34,600,000 in unpaid requests for finding for new and expanded programs in the ISD queue over and above the $7,500,000 appropriated for the ISD Fund. *See* Exhibit 24.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on May 12, 2003

/s/Lovell Hopper
LOVELL HOPPER

[See JA Vol. II, PART 2 for Exhibit 1 to Declaration of Lovell Hopper]

Supreme Court, U.S.
FILED
JUN 18 2004
OFFICE OF THE CLERK

Nos. 02-1472 & 03-853

IN THE

Supreme Court of the United States

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, et al.,
Respondents.

TOMMY G. THOMPSON, Secretary of Health and Human Services,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
Respondent.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Tenth Circuit and for the Federal Circuit

JOINT APPENDIX
Volume II

THEODORE B. OLSON
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
Counsel of Record for the Federal Parties

LLOYD B. MILLER
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240
Counsel of Record for Cherokee Nation and Shoshone-Paiute Tribes

PETITIONS FOR CERTIORARI FILED APRIL 3 AND DECEMBER 11, 2003
CERTIORARI GRANTED MARCH 22, 2004

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS

Volume I Page

PART 1: Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation v. United States; Tommy G. Thompson, Secretary of Health and Human Services, *et al.*, No. 02-1472

Relevant docket entries from the United States Court of Appeals for the Tenth Circuit (Case No. 01-7106) 1

Relevant docket entries from the United States District Court for the Eastern District of Oklahoma (Case No. 99-092-S CIV) 3

Plaintiffs' Exhibit 4: Indian Self-Determination Memorandum No. 92-2, dated Feb. 27, 1992 6

Plaintiffs' Exhibit 5: Indian Health Service Circular No. 96-04, dated Apr. 12, 1996 20

Plaintiffs' Exhibit 9: Letter to the Indian Health Service Director from the Director of Headquarters Operations, dated Sept. 24, 1997 49

Plaintiffs' Exhibit 16: Affidavit of Winona L. Manning, Finance Director of the Shoshone-Paiute Tribes of the Duck Valley Reservation, dated July 20, 1999 54

Plaintiffs' Exhibit 17: Affidavit of Walden Townsend, Owyhee Community Health Facility Tribal Health Administrator for the Shoshone-Paiute Tribes of the Duck Valley Reservation, dated July 20, 1999 62

Plaintiffs' Exhibit 22: Compact of Self-Governance between the Duck Valley Shoshone Paiute Tribes and the United States of America, Oct. 1, 1994, as amended Oct. 1, 1995 69

TABLE OF CONTENTS—Continued

Page

Plaintiffs' Exhibit 22A: Compact of Self-Governance between the Duck Valley Shoshone Paiute Tribes and the United States of America, Oct. 1, 1994, as amended Oct. 1, 1995, Amendment No. 1 101

Plaintiffs' Exhibit 23: Annual Funding Agreement between the Duck Valley Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America, Oct. 1, 1995 [See JA Vol. II, PART 1 for attached Appendix A (funding tables)] 104

Plaintiffs' Exhibit 26: Amendment No. 1, Annual Funding Agreement between the Duck Valley Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America, Oct. 1, 1995, as amended Mar. 6, 1996 127

Plaintiffs' Exhibit 27: Annual Funding Agreement between the Duck Valley Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America, Oct. 1, 1996 [See JA Vol. II, PART 1 for attached Appendix A (funding tables)] 129

Plaintiffs' Exhibit 34: Shoshone-Paiute Tribes' Letter Re: Contract Disputes Act claim for 1996 contract support costs, dated Sept. 20, 1996 150

Plaintiffs' Exhibit 35: Shoshone-Paiute Tribes' Letter Re: Contract Disputes Act Claim for 1997 Contract Support Costs, dated Sept. 23, 1997 154

Plaintiffs' Exhibit 36: Affidavit of Bill Thorne, Executive Director of the Cherokee Nation Health Service, dated July 19, 1999 158

TABLE OF CONTENTS—Continued

Page

Plaintiffs' Exhibit 37: Compact of Self-Governance between the United States of America and Cherokee Nation, dated June 30, 1993 172

Plaintiffs' Exhibit 39: Fiscal Year 1997 Annual Funding Agreement between the United States of America and Cherokee Nation, dated July 24, 1996 [See JA Vol. II, PART 1 for Attachments] 185

Plaintiffs' Exhibit 47: Cherokee Nation's Letter Re: Contract Disputes Act Claim for Fiscal Year 1997 Indirect Costs, dated Sept. 26, 1997 201

Plaintiffs' Exhibit 66: Indian Health Service "Procedures for Allocating Prior Year Unobligated Balances to Satisfy CSC Shortfalls" (Draft) 206

Plaintiffs' Exhibit 67: Letter from Chief, Department of Health and Human Services, Office of the General Counsel, Indian Health Service Branch, to the Director, Indian Health Service, dated Mar. 25, 1999 210

Defendants' Exhibit: Declaration of Carl L. Fitzpatrick, Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service, dated Sept. 3, 1999 [See JA Vol. II, PART 1 for attached tables] 213

The Appendix to the Petition for a Writ of Certiorari in Case No. 02-1472 contains the following material which is omitted from the Joint Appendix:

Appendix A: Opinion of the Court of Appeals for the Tenth Circuit, filed Nov. 26, 2002 ..... 1a

TABLE OF CONTENTS—Continued

Page

Appendix B: Order of the District Court for the Eastern District of Oklahoma, filed June 25, 2001 ..... 24a

Appendix C: Order of the Court of Appeals for the Tenth Circuit denying Appellants' petition for rehearing and suggestion for rehearing *en banc*, filed Jan. 23, 2003 ..... 51a

---

PART 2: Tommy G. Thompson, Secretary of Health and Human Services, *et al.*, v. Cherokee Nation of Oklahoma, No. 03-853

Relevant docket entries from the United States Court of Appeals for the Federal Circuit (Case No. 02-1286) 224

Relevant certified list entries from the Interior Board of Contract Appeals (Nos. 3877-98 through 3879-98) 226

Excerpts of the IBCA Appeal File, submitted Mar. 13, 1998

Tab 3 - Cherokee Nation's Letter Re: Contract Disputes Act Claim For FY 1994, 1995, and 1996 Indirect Costs, dated Sept. 27, 1996 229

Tab 11 - FY-1994 Annual Funding Agreement, Attachment 1 to Compact of Self-Governance Between the United States of America and Cherokee Nation, dated June 30, 1993 236

TABLE OF CONTENTS—Continued

Page

Tab 12 - Letter from Acting Director, Office of Tribal Self-Governance, dated June 30, 1993, transmitting Addendum to FY-1994 Annual Funding Agreement (Attachment I to Compact of Self-Governance Between United States of America and Cherokee Nation), dated Aug. 23, 1993 241

Tab 13 - Second Addendum to the FY 1994 Annual Funding Agreement (Attachment I to the Compact of Self-Governance Between the Cherokee Nation and the United States of America), Sept. 30, 1993 246

Tab 14 - Addendum No. 3 to the FY 1994 Annual Funding Agreement Between the United States of America and The Cherokee Nation, excluding letter, Sept. 26, 1994 249

Tab 18 - Fiscal Year 1995 Annual Funding Agreement Between the United States of America and Cherokee Nation, dated June 30, 1994 253

Tab 21 - Addendum No. 3 to the FY 1995 Annual Funding Agreement Between the United States of America and The Cherokee Nation (unsigned by the Indian Health Service), excluding letter 260

TABLE OF CONTENTS—Continued

Page

Tab 23 - Fiscal Year 1996 Annual Funding Agreement Between the United States of America and Cherokee Nation, dated June 30, 1995, and Letter from the Cherokee Nation Self-Governance Coordinator to the Acting Director of the Office of Self-Governance, Indian Health Services, dated June 29, 1995 [See JA Vol. II, PART 2 for Attachment #2, AFA Detail Report] 265

Tab 24 - Addendum No. 1 to FY 1996 Annual Funding Agreement Between the United States of America and Cherokee Nation (unsigned by the Indian Health Service) 279

Secretary's Exhibit: Declaration of Carl L. Fitzpatrick, Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service, dated Dec. 18, 1998 286

Secretary's Exhibit: Declaration of Daniel J. Cesari, Deputy Director of the Division of Financial Management at the Headquarters of the Indian Health Service, dated Feb. 18, 1999 [See JA Vol. II, PART 2 for attached table] 288

Secretary's Exhibit: Declaration of Carl L. Fitzpatrick, Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service, dated Mar. 27, 2000 [See JA Vol. II, PART 2 for attached tables] 295

Appellee's Supplemental Brief and Attachments 1-2, filed Apr. 24, 2003 [See JA Vol. II, PART 2 for Attachments 3- 6] 305

TABLE OF CONTENTS—Continued

Page

Supplemental Brief of Appellant Tommy G. Thompson, filed Apr. 24, 2003 [See JA Vol. II, PART 2 for Addendum] 357

Revised Supplemental Brief of Appellant Tommy G. Thompson, filed May 12, 2003, and Declaration of Lovell Hopper, Director of the Division of Financial Management for the Indian Health Service, dated May 12, 2003 [See JA Vol. II, PART 2 for Exhibit 1 to Declaration of Lovell Hopper] 369

The Appendix to the Petition for a Writ of Certiorari in Case No. 03-853 contains the following material which is omitted from the Joint Appendix:

Appendix A:
Opinion of the Court of Appeals for the Federal Circuit, filed July 3, 2003 ..... 1a

Appendix B:
Order of the Court of Appeals for the Federal Circuit denying the Petition for Rehearing *En Banc*, filed Sept. 12, 2003 ..... 36a

Appendix C:
Order of the IBCA accepting the stipulation on damages, filed Nov. 15, 2001 ..... 38a

Appendix D:
Order of the IBCA affirming earlier Order *on reconsideration*, filed Mar. 21, 2001 ..... 43a

Appendix E:
Order of the IBCA concerning liability, filed June 30, 1999 ..... 50a

Appendix F:
Final Decision denying the Cherokee Nation's claims, decided Oct. 31, 1997 ..... 74a

TABLE OF CONTENTS—Continued

Volume II Page

PART 1: Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation v. United States; Tommy G. Thompson, Secretary of Health and Human Services, *et al.*, No. 02-1472

Appendix A (funding tables) attached to Plaintiff's Exhibit 23: Annual Funding Agreement between the Duck Valley Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America, Oct. 1, 1995 [See JA Vol. I, PART 1 for Exhibit 23] 395

Appendix A (funding tables) attached to Plaintiff's Exhibit 27: Annual Funding Agreement between the Duck Valley Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America, Oct. 1, 1996 [See JA Vol. I, PART 1 for Exhibit 27] 401

Attachments to Plaintiff's Exhibit 39: Fiscal Year ~~1997~~ Annual Funding Agreement between the United States of America and Cherokee Nation, dated July 24, 1996 [See JA Vol. I, PART 1 for Exhibit 39] 407

Tables attached to Defendants' Exhibit: Declaration of Carl L. Fitzpatrick, Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service, dated Sept. 3, 1999 [See JA Vol. I, PART 1 for Declaration of Carl L. Fitzpatrick] 421

TABLE OF CONTENTS—Continued

Page

PART 2: Tommy G. Thompson, Secretary of Health and Human Services, *et al.*, v. Cherokee Nation of Oklahoma, No. 03-853

Attachment #2, AFA Detail Report attached to Tab 23: Fiscal Year 1996 Annual Funding Agreement between the United States of America and Cherokee Nation, dated June 30, 1995 [See JA Vol. I, PART 2 for Tab 23] 451

Table attached to Declaration of Daniel J. Cesari, Deputy Director of the Division of Financial Management at the Headquarters of the Indian Health Service, dated Feb. 18, 1999 [See JA Vol. I, PART 2 for Declaration of Daniel J. Cesari] 457

Tables attached to Declaration of Carl L. Fitzpatrick, Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service, dated Mar. 27, 2000 [See JA Vol. I, PART 2 for Declaration of Carl L. Fitzpatrick] 459

Attachments 3-6 to Appellee's Supplemental Brief, filed April 24, 2003 [See JA Vol. I, PART 2 for Appellee's Supplemental Brief and Attachments 1-2] 491

Addendum to Supplemental Brief of Appellant Tommy G. Thompson, filed Apr. 24, 2003 [See JA Vol. I, PART 2 for Supplemental Brief of Appellant Tommy G. Thompson] 503

Exhibit 1 to Declaration of Lovell Hopper, Director of the Division of Financial Management for the Indian Health Service, dated May 12, 2003 [See JA Vol. I, PART 2 for Revised Supplemental Brief and Declaration of Lovell Hopper] 525

Appendix A (funding tables)
attached to Plaintiff's Exhibit 23:
Annual Funding Agreement between the
Duck Valley Shoshone-Paiute Tribes and the
Secretary of the Department of Health and Human
Services of the United States of America, Oct. 1, 1995
[See JA Vol. I, PART 1 for Exhibit 23]

DUCK VALLEY FY 1996 AFA NEGOTIATION FUNDING SUMMARY

Appendix "A"

638 CONTRACT BASE

Tribal Name: DUCK VALLEY SHOSHONE-PAIUTE TRIBES

Revised: July 25, 1995

Fiscal Year 1996

Budget Category	FY 1995 Prog Base	LESS FY 1996 REDUCTIONS: ADMIN REDUCT.	PROCURE REDUCT	CONFERE REDUCT	SUB TOTAL REDUCT	FY-1996 REVISED FUNDING	FY-1996 MANDAT. Increase	FY-1996 RECURR'G BASE	PROG. INCR/ DECR.	IPA/ MOA	SERVICE AND SUPPLY	Non Recurr'g	SU 638 Base Amount	Less Buy-back	FY-1996 Award Amount
Hospital & Clinics	63,874				0	63,874		63,874					63,874		0
Dental					0	0		0					0		0
Mental Health	117,836				0	117,836		117,836					117,836		117,836
Alcohol	132,409				0	132,409		132,409					132,409		132,409
PHN	61,805				0	61,805		61,805					61,805		61,805
HE	19,112				0	19,112		19,112					19,112		19,112
CHR	99,880				0	99,880		99,880					99,880		99,880
Indian Hlth Professions					0	0		0					0		0
Tribal Mgmt					0	0		0					0		0
Direct Operations					0	0		0					0		0
CSC Direct					0	0		0					0		0
CSC Indirect					0	0		0					0		0
Services Total	494,896	0	0	0	0	494,896	0	494,896	0	0		0	494,896	0	494,896
CHS	44,845				0	44,845		44,845					44,845		44,845
CHS (CHEF (HQ only)								0					0		0
HSD Direct (HQ only)					0			0					0		0
HSD Indirect (HQ only)					0			0					0		0
Envir Health Support					0	0		0					0		0
Facilities Support					0	0		0					0		0
M & I Routine					0	0		0					0		0
M & I Project Pool					0	0		0					0		0
CSC					0	0		0					0		0
San Fac Construction					0	0		0					0		0
Equip Replacement					0	0		0					0		0
Facilities Total	0	0	0	0	0	0	0	0	0	0		0	0	0	0
Grand Total	639,241	0	0	0	0	639,241	0	639,241	0	0		0	639,241	0	639,241

DV95SQ/DV96AFA.WB1

DUCK VALLEY FY 1996 AFA NEGOTIATION FUNDING SUMMARY

Appendix "A"

SERVICE UNIT SHARES

Tribal Name: DUCK VALLEY SHOSHONE-PAIUTE TRIBES

Fiscal Year 1996

Revised: July 25, 1995

Budget Category	FY 1996 Prog Base	LESS FY 1996 REDUCTIONS ADMIN	PROCURE	CONFERE	SUB TOTAL REDUCTN	FY-1996 REVISED FUNDING	FY-1996 MANDAT. INCREASE	FY-1996 RECURR'G BASE	PROG. INCR/ DECR	IPA/ MOA	SERVICE AND SUPPLY	Non Recurr'g	SU 638 Base Amount	LESS BUY BACK	FY-1996 Award Amount
Hospital & Clinics	2,404,334				0	2,404,334		2,404,334					2,404,334		2,4 4
Dental	73,052				0	73,052		73,052					73,052		7
Mental Health					0	0		0					0		0
Alcohol	19,723				0	19,723		19,723					19,723		19,723
PHN					0	0		0					0		0
HE					0	0		0					0		0
CHR					0	0		0					0		0
Indian Hlth Professions					0	0		0					0		0
Tribal Mgmt					0	0		0					0		0
Direct Operations					0	0		0					0		0
CSC Direct					0	0		0					0		0
CSC Indirect					0	0		0					0		0
Services Total	2,497,109	0	0	0	0	2,497,109	0	2,497,109	0	0		0	2,497,109	0	2,497,109
CHS	1,200,000				0	1,200,000		1,200,000					1,200,000		1,200,000
CHS CHEF (HQ only)								0					0		0
ISD Direct (HQ only)					0			0					0		0
ISD Indirect (HQ only)					0			0					0		0
Envir Health Support	25,373				0	25,373		25,373					25,373		2
Facilities Support	180,097				0	180,097		180,097					180,097		1 97
M & I Routine	72,588				0	72,588		72,588					72,588		72,588
M & I Project Pool					0	0		0					0		0
FSA ARRA					0	0		0					0		0
San Fac Construction					0	0		0					0		0
Equip Replacement					0			0					0		0
Facilities Total	278,058	0	0	0	0	278,058	0	278,058	0	0		0	278,058	0	278,058
Grand Total	3,975,067	0	0	0	0	3,975,067	0	3,975,067	0	0		0	3,975,067	0	3,975,067

DV96SG/DV96AFA.WB1

DUCK VALLEY FY 1996 AFA NEGOTIATION FUNDING SUMMARY

Appendix "A"

AREA OFFICE SHARES

Tribal Name: DUCK VALLEY SHOSHONE-PAIUTE TRIBES

Fiscal Year 1996

Revised: July 25, 1995

Budget Category	FY 1995 Prog Base	LESS FY 1996 REDUCTIONS ADMIN	PROCUR	CONFERE	SUB TOTAL REDUCTN	REVISED FY-1996 FUNDING	FY-96 Mand Increase	FY-1996 Recurr'g Base	Prog. Incr/ Decr.	IPA/ MOA	Service and Supply	Non Recurr'g	BU 638 Base Amount	Less Buy Back	FY-1996 Award Amount
Hospital & Clinics	78,040				0	78,040		78,040					78,040		78,040
Dental	4,188				0	4,188		4,188					4,188		4,188
Mental Health	2,330				0	2,330		2,330					2,330		2,330
Alcohol	10,188				0	10,188		10,188					10,188		10,188
PHN	1,883				0	1,883		1,883					1,883		1,883
HE	2,067				0	2,067		2,067					2,067		2,067
CHR	189				0	189		189					189		189
Indian Hlth Professions					0	0		0					0		0
Tribal Mgmt					0	0		0					0		0
Direct Operations	3,879				0	3,879		3,879					3,879		3,879
CBC Direct					0	0		0					0		0
CBC Indirect					0	0		0					0		0
Services Total	100,731	0	0	0	0	100,731	0	100,731	0	0		0	100,731	0	100,731
CHS	8,249				0	8,249		8,249					8,249		8,249
CHS CHEF (HQ only)								0					0		0
ISD Direct (HQ only)					0			0					0		0
ISD Indirect (HQ only)					0			0					0		0
Envir Health Support	0				0	0		0					0		0
Facilities Support	16,012				0	16,012		16,012					16,012		16,012
M & I Routine					0	0		0					0		0
M & I Project Pool	161,631				0	161,631		161,631					161,631		161,631
CBC					0	0		0					0		0
San Fac Construction	66,999				0	66,999		66,999					66,999	(66,999)	0
Equip Replacement					0			0					0		0
Facilities Total	244,842	0	0	0	0	244,842	0	244,842	0	0		0	244,842	(66,999)	177,843
Grand Total	383,622	0	0	0	0	327,622	0	383,622	0	0		0	383,622	(66,999)	283,623

DUCK VALLEY FY 1996 AFA NEGOTIATION FUNDING SUMMARY

Appendix "A"

HEADQUARTERS SHARES

Tribal Name: DUCK VALLEY SHOSHONE-PAIUTE TRIBES

Fiscal Year 1996

Revised: July 25, 1995

Budget Category	FY-1996 PROGRAM BASE	LESS FY 1996 REDUCTIONS ADMIN REDUCT	PROCURE REDUCT	CONFERE REDUCT	SUB TOTAL REDUCTN	FY-1996 REVISED FUNDING	FY-1996 MANDAT INCREASE	FY-1996 RECURR'G BASE	PROG. INCR/ DECR	IPA/ MOA	SERVICE AND SUPPLY	NON RECURR'G	HDQTRS BASE AMOUNT	LESS BUY BACK	FY-1996 AWARD AMOUNT
Hospital & Clinics	38,642				0	38,642		38,642					38,642		[illegible]
Dental	1,086				0	1,086		1,086					1,086		1,086
Mental Health	1,611				0	1,611		1,611					1,611		1,611
Alcohol	4,843				0	4,843		4,843					4,843		4,843
PHN	1,008				0	1,008		1,008					1,008		1,008
HE	1,268				0	1,268		1,268					1,268		1,268
CHR	2,340				0	2,340		2,340					2,340		2,340
Indian Hlth Professions					0	0		0					0		0
Tribal Mgmt					0	0		0					0		0
Direct Operations	17,582				0	17,582		17,582					17,582		17,582
CSC Direct	38,100				0	38,100		38,100					38,100		38,100
CSC Indirect	122,547				0	122,547		122,547					122,547		122,547
Services Total	227,017	0	0	0	0	227,017	0	227,017	0	0		0	227,017	0	227,017
CHS	1,701				0	1,701		1,701					1,701		1,701
CHS CHEF (HQ only)								0					0		0
ISD Direct (HQ only)					0			0				692,892	692,892		692,892
ISD Indirect (HQ only)					0			0				1,192,993	1,192,993		1,192,993
Envir Health Support	420				0	420		420					420		0
Facilities Support	8,971				0	8,971		8,971					8,971		8,971
M & I Routine					0	0		0					0		0
M & I Project Pool					0	0		0					0		0
CSC					0	0		0					0		0
San Fac Construction	1,920				0	1,920		1,920					1,920	(1,920)	0
Equip Replacement					0			0					0		0
Facilities Total	12,311	0	0	0	0	12,311	0	12,311	0	0		0	12,311	(1,920)	10,391
Grand Total	241,029	0	0	0	0	241,029	0	241,029	0	0		1,785,885	2,026,914	(1,920)	2,024,994

DV96SG/DV96SAFA.WB1

DUCK VALLEY FY 1996 AFA NEGOTIATION FUNDING SUMMARY

Appendix "A"

FA TOTAL FUNDS

ibal Name: DUCK VALLEY SHOSHONE-PAIUTE TRIBES

scal Year 1996

Revised: July 25, 1996

Budget Category	FY-1996 PROGRAM BASE	LESS FY 1996 REDUCTIONS ADMIN REDUCT	PROCURE REDUCT	CONFERE REDUCT	SUB TOTA REDUCTN	FY-1996 REVISED FUNDING	FY-96 Mand Increase	FY-1996 RECURR'G BASE	PROG. INCR/ DECR	IPA/ MOA	SERVICE AND SUPPLY	NON RECURR'G	AFA BASE AMOUNT	LESS BUY BACK	FY-1996 AWARD AMOUNT
ospital & Clinics	2,682,890	0	0	0	0	2,682,890	0	2,682,890					2,682,890		[illegible]
ental	78,326	0	0	0	0	78,326	0	78,326					78,326		78,326
ental Health	121,786	0	0	0	0	121,786	0	121,786					121,786		121,786
lcohol	167,141	0	0	0	0	167,141	0	167,141					167,141		167,141
HN	64,376	0	0	0	0	64,376	0	64,376					64,376		64,376
E	22,437	0	0	0	0	22,437	0	22,437					22,437		22,437
HR	102,389	0	0	0	0	102,389	0	102,389					102,389		102,389
dian Hlth Profes.	0	0	0	0	0	0	0	0					0		0
ribal Mgmt	0	0	0	0	0	0	0	0					0		0
irect Operations	21,461	0	0	0	0	21,461	0	21,461					21,461		21,461
SC Direct	36,100	0	0	0	0	36,100	0	36,100					36,100		36,100
SC Indirect	122,647	0	0	0	0	122,647	0	122,647					122,647		122,647
Services Total	3,319,453	0	0	0	0	3,319,453	0	3,319,453	0	0		0	3,319,453	0	3,319,453
HS	1,251,595	0	0	0	0	1,251,595	0	1,251,595					1,251,595		1,251,595
HS CHEF (HQ only)	0					0		0					0		0
SD Direct (HQ only)	0				0	0		0				692,892	692,892		692,892
SD Indirect (HQ only)	0				0	0		0				1,192,093	1,192,093		1,192,093
nvir Health Support	25,793	0	0	0	0	25,793	0	25,793					25,793		25,793
acilities Support	206,880	0	0	0	0	206,880	0	206,880					206,880		206,880
M & I	72,688	0	0	0	0	72,688	0	72,688					72,688		72,688
M & I Project Pool	161,631	0	0	0	0	161,631	0	161,631					161,631		161,631
SC	0	0	0	0	0	0	0	0					0		0
San Fac Construction	70,919	0	0	0	0	70,919	0	70,919					70,919	(70,919)	0
Equip Replace	0	0	0	0	0	0	0	0					0		0
Facilities Total	537,511	0	0	0	0	537,511	0	537,511	0	0		0	537,511	(70,919)	466,592
Grand Total	5,108,889	0	0	0	0	5,108,889	0	5,108,889	0	0		1,785,885	6,894,744	(70,919)	6,823,825

DV96SG/DV96ZAFA.WB1

[This Page Intentionally Left Blank]

Appendix A (funding tables) attached to Plaintiff's Exhibit 27: Annual Funding Agreement between the Duck Valley Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America, Oct. 1, 1996

[See JA Vol. I, PART 1 for Exhibit 27]

DUCK VALLEY FY 1997 AFA NEGOTIATION FUNDING SUMMARY

Appendix "A"

638 CONTRACT BASE

SHOSHONE-PAIUTE TRIBES OF DUCK VALLEY

Revised: May 30, 1996

Fiscal Year 1997

Budget Category	FY 1997 Program Base Funds: FY 1996 Prog Base	Program Formula	Program Increase	Total	Conference Reduce	FY-1997 Revised Funding	FY-1997 Mandatory Increase	FY-1997 Recurring Base	FY 1997 Program Incr/Decr	IPA/ MOA	Service and Supply	Non-Recur	Adjusted AFA Amount	Less IHS Retain	FY-1997 Award Amount
Hospital & Clinics	63,874			63,874		63,874		63,874					63,874		63,874
Dental				0		0		0					0		0
Mental Health	117,836			117,836		117,836		117,836					117,836		117,836
Alcohol	132,509			132,509		132,509		132,509					132,509		132
PHN	61,606			61,606		61,606		61,606					61,606		61,606
HE	19,112			19,112		19,112		19,112					19,112		19,112
CHR	99,880			99,880		99,880		99,880					99,880		99,880
Indian Hlth Professions				0		0		0					0		0
Tribal Mgmt				0		0		0					0		0
Direct Operations				0		0		0					0		0
CSC Direct /1	43,834			43,834		43,834		43,834					43,834		43,834
CSC Indirect /1	135,894			135,894		135,894		135,894					135,894		135,894
Services Total	674,124	0	0	674,124	0	674,124	0	674,124	0	0	0	0	674,124	0	674,124
CHS	44,645			44,645		44,645		44,645					44,645		44,645
CHS CHEF (HQ only)				0		0		0					0		0
ISD Direct (HQ only)				0		0		0					0		0
ISD Indirect (HQ only)				0		0		0					0		0
Envir Health Support				0		0		0					0		
Facilities Support				0		0		0					0		0
M & I Routine				0		0		0					0		0
M & I Project Pool				0		0		0					0		0
CSC				0		0		0					0		0
San Fac Construction				0		0		0					0		0
Equip Replacement				0		0		0					0		0
Facilities Total	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grand Total	718,769	0	0	718,769	0	718,769	0	718,769	0	0	0	0	718,769	0	718,769

Footnotes:

1/ Contract Support Cost funding includes FY 1996 correction/restoration of FY 1995 amount and FY 1996 increase for ISD funds provided for AFA in FY 1995.

Net SU amt less CSC 539,341

TA972AFA.WI

DUCK VALLEY FY 1997 AFA NEGOTIATION FUNDING SUMMARY

Appendix "A'

SERVICE UNIT SHARES

SHOSHONE-PAIUTE TRIBES OF DUCK VALLEY

Revised: May 30, 1996

Fiscal Year 1997

Budget Category	FY 1997 Program Base Funds: FY 1996 Prog Base	Program Formula	Program Increase	Total	Conference Reduce	FY-1997 Revised Funding	FY-1997 Mandatory Increase	FY-1997 Recurring Base	FY 1997 Program Incr/Decr	IPA/ MOA	Service and Supply	Non-Recur	Adjusted AFA Amount	Less IHS Retain	FY-1997 Award Amount
			2/									3/			
Hospital & Clinics	2,404,334		8,000	2,412,334		2,412,334		2,412,334				58,767	2,469,101		2,469,101
ental	73,082		1,599	74,681		74,681		74,681				2,255	76,906		76,906
Mental Health				0		0		0				1,314	1,314		-
Alcohol	19,723			19,723		19,723		19,723					19,723		19,723
PHN				0		0		0				8,026	8,026		8,026
HE				0		0		0					0		0
CHR				0		0		0					0		0
Indian Hlth Professions				0		0		0					0		0
Tribal Mgmt				0		0		0					0		0
Direct Operations				0		0		0					0		0
						0		0							
CSC Direct				0		0		0					0		0
CSC Indirect				0		0		0					0		0
Services Total	2,497,109	0	9,599	2,506,709	0	2,506,709	0	2,506,709	0	0	0	68,362	2,575,070	0	2,575,070
CHS	1,200,000			1,200,000		1,200,000		1,200,000					1,200,000		1,200,000
CHS CHEF (HQ only)				0		0		0					0		0
SD Direct (HQ only)				0		0		0					0		0
SD Indirect (HQ only)				0		0		0					0		0
Envir Health Support	33,667	1/		33,667		33,667		33,667					33,667		33,667
Facilities Support	197,020	1/		197,020		197,020		197,020					197,020		197,020
M & I Routine	148,174	1/		148,174		148,174		148,174					148,174		148,174
M & I Project Pool	92,911	1/		92,911		92,911		92,911					92,911		92,911
FSA AREA				0		0		0					0		0
San Fac Construction	50,028	1/		50,028		50,028		50,028					50,028	(50,028)	0
Equip Replacement		0	0	0		0		0					0		0
Facilities Total	528,890	0	0	528,890	0	528,890	0	528,890	0	0	0	0	528,890	(50,028)	488,862
Grand Total	4,226,799	0	9,599	4,236,399	0	4,236,399	0	4,236,399	0	0		68,362	4,303,760	(50,028)	4,253,732

Footnotes:

1/ These amounts are updated per the latest RRM for FY-1996 and are used to negotiated the FY-1997 Compact

2/ Recurr ...ram increases for Continuing Medical Education and Dental Equipment

3/ These ...ing increases provides shares of Area PCS & Special Pay funds, However, if IHS f ...vailable in FY-1997, as per agreement of 8/07. ...S OTA and the Tribe, these same N-R funds "will not be available" from the Area. ... 8, footnote 2, of AFA).

DUCKVLLYITA972AFA.WB2

4,175,370

DUCK VALLEY FY 1997 AFA NEGOTIATION FUNDING SUMMARY

Appendix "A"

AREA OFFICE SHARES

SHOSHONE-PAIUTE TRIBES OF DUCK VALLEY

Revised: May 30, 1996

Fiscal Year 1997

Budget Category	FY 1997 Program Base Funds: FY 1997 Share	Program Formula	Program Increase	Total	Conference Reduce	FY-1997 Revised Funding	FY-1997 Mandatory Increase	FY-1997 Recurring Base	FY 1997 Program Incr/Decr	IPA/ MOA	Service and Supply	Non-Recur	Adjusted AFA Amount	Less IHS Retain 2/	FY-1997 Award Amount
Hospital & Clinics	88,692			88,692		88,692		88,692					88,692	(18,296)	80,396
Dental	4,073			4,073		4,073		4,073					4,073		4,073
Mental Health 1/	2,169			2,169		2,169		2,169					2,169		2,169
Alcohol	9,096			9,096		9,096		9,096					9,096		9,096
PHN	1,292			1,292		1,292		1,292					1,292		1,292
HE	1,836			1,836		1,836		1,836					1,836		1,836
CHR	99			99		99		99					99		99
Indian Hlth Professions				0		0		0					0		0
Tribal Mgmt				0		0		0					0		0
Direct Operations	16,687			16,687		16,687		16,687					16,687		16,687
						0		0							
CSC Direct				0		0		0					0		0
CSC Indirect				0		0		0					0		0
Services Total	100,720	0	0	100,720	0	100,720	0	100,720	0	0	0	0	100,720	(18,296)	82,424
CHS	7,675			7,675		7,675		7,675					7,675		7,675
CHS CHEF (HQ only)				0		0		0					0		0
ISD Direct (HQ only)				0		0		0					0		0
ISD Indirect (HQ only)				0		0		0					0		0
Envir Health Support				0		0		0					0		0
Facilities Support				0		0		0					0		0
M & I Routine				0		0		0					0		0
M & I Project Pool				0		0		0					0		0
OSC				0		0		0					0		0
San Fac Construction				0		0		0					0		0
Equip Replacement	0	0	0	0		0		0					0		0
Facilities Total	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grand Total	108,395	0	0	108,395	0	108,395	0	108,395	0	0		0	108,395	(18,296)	93,100

Footnotes:

1/ Includes Mental Health $994 and Social Services $1,175

2/ Includes Buy-Backs for DIRM Support - $3,904; DFM - $3,179; OHR - $8,203

DUCKVLLYITA972AFA.WB2

DUCK VALLEY FY 1997 AFA NEGOTIATION FUNDING SUMMARY

Appendix "A"

HEADQUARTERS SHARES

SHOSHONE-PAIUTE TRIBES OF DUCK VALLEY

Fiscal Year 1997

Revised: May 30, 1996

Budget Category	FY 1997 Program Base Funds				Conference Reduce	FY-1997 Revised Funding	FY-1997 Mandatory Increase	FY-1997 Recurring Base	FY 1997 Program Incr/Decr	IPA/ MOA	Service and Supply	Non-Recur	Adjusted AFA Amount	Less BIS Retain	FY-1997 AWARD AMOUNT
	TSA SHARE	Program Formula	Program Increase	Total										3/	
Hospital & Clinics	40,804			40,804		40,804		40,804					40,804	(18,036)	22,768
Dental	1,400			1,400		1,400		1,400					1,400		1,400
Mental Health	1,892			1,892		1,892		1,892					1,892		1
Alcohol	4,945			4,945		4,945		4,945					4,945		4
PHN	1,040			1,040		1,040		1,040					1,040		1,040
HE	1,295			1,295		1,295		1,295					1,295		1,295
CHR	2,745			2,745		2,745		2,745					2,745		2,745
Indian Hlth Professions	0			0		0		0					0		0
Tribal Mgmt	0			0		0		0					0	4/	0
Direct Operations	16,299			16,299		16,299		16,299					16,299	(2,675)	13,614
						0		0							
CSC Direct				0		0		0					0		0
CSC Indirect				0		0		0					0		0
Services Total	70,410	0	0	70,410	0	70,410	0	70,410	0	0	0	0	70,410	(20,711)	49,699
		1/													
CHS	1,891	14,877		16,868		16,868		16,868					16,868		16,868
CHS CHEF				0		0		0					0		0
ISD Direct (HQ only)			494,617	494,617		494,617		494,617				387,400	881,917		881,917
ISD Indirect (HQ only)			1,173,149	1,173,149		1,173,149		1,173,149					1,173,149		1,173,149
		2/													
Envir Health Support		2,948		2,948		2,948		2,948					2,948		2,948
Facilities Support		16,984		16,984		16,984		16,984					16,984		16,984
M & I Routine				0		0		0					0		0
M & I Project Pool				0		0		0					0		0
CSC				0		0		0					0	5/	0
San Fac Construction		3,242		3,242		3,242		3,242					3,242	(3,242)	0
Equip Replacement		34,391		34,391		34,391		34,391					34,391		34,391
Facilities Total	0	57,443	0	57,443	0	57,443	0	57,443	0	0	0	0	57,443	(3,242)	54,201
Grand Total	72,101	72,320	1,667,666	1,812,087	0	1,812,087	0	1,812,087	0	0		387,400	2,179,487	(23,953)	2,155,534

Footnotes:

1/ Includes Hq share of Fiscal Intermediary $14,877 as Recurring Program dollars

2/ Includes the latest updated FY-1996 RRM distribution for FY-1997

3/ Less Bu[illegible] of H&C Hq East DIRM $10,828 & Hq West DIRM $7,208

4/ Less F[illegible] Direct Ops Hq East DIRM $2,675

5/ Less L[illegible] Hq East Sanitation Facilities Construction $3,242

DUCKVLLY\TA873AFA.WB2

69,078

DUCK VALLEY FY 1997 AFA NEGOTIATION FUNDING SUMMARY

Appendix "A"

AFA TOTAL FUNDS

SHOSHONE-PAIUTE TRIBES OF DUCK VALLEY

Revised: May 30, 1996

Fiscal Year 1997

Budget Category	FY 1997 Program Base Funds				Confer Reduce	FY-1997 Revised Funding	FY-1997 Mand. Increase	FY-1997 Recurring Base	FY 1997 Program Incr/Decr	IPA/ MOA	Service and Supply	Non-Recur	Adjusted AFA Amount	Less 638 Retain	FY-1997 Award Amount
	FY 1996 Prog Base	Program Formula	Program Increase	Total											
Hospital & Clinics	2,574,894	0	8,000	2,582,894	0	2,582,894	0	2,582,894	0	0	0	56,787	2,639,681	(33,322)	2,606,139
ntal	78,529	0	1,595	80,124	0	80,124	0	80,124	0	0	0	2,256	82,379	0	82,379
...ental Health	121,897	0	0	121,897	0	121,897	0	121,897	0	0	0	1,314	123,211	0	123,2...
Alcohol	166,163	0	0	166,163	0	166,163	0	166,163	0	0	0	0	166,163	0	166,...
PHN	63,837	0	0	63,837	0	63,837	0	63,837	0	0	0	8,026	71,863	0	71,863
HE	22,042	0	0	22,042	0	22,042	0	22,042	0	0	0	0	22,042	0	22,042
CHR	102,701	0	0	102,701	0	102,701	0	102,701	0	0	0	0	102,701	0	102,701
Indian Hlth Professions	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Tribal Mgmt	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Direct Operations	32,979	0	0	32,979	0	32,979	0	32,979	0	0	0	0	32,979	(2,678)	30,301
CSC Direct	43,634	0	0	43,634	0	43,634	0	43,634	0	0	0	0	43,634	0	43,634
CSC Indirect	136,894	0	0	136,894	0	136,894	0	136,894	0	0	0	0	136,894	0	136,894
Services Total	3,342,383	0	9,595	3,351,983	0	3,351,983	0	3,351,983	0	0	0	68,382	3,420,324	(36,997)	3,384,327
CHS	1,264,011	14,877	0	1,298,888	0	1,298,888	0	1,298,888	0	0	0	0	1,298,888	0	1,298,888
CHS CHEF (HQ only)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ISD Direct (HQ only)	0	0	494,617	494,617	0	494,617	0	494,617	0	0	0	387,400	881,817	0	881,817
) Indirect (HQ only)	0	0	1,173,149	1,173,149	0	1,173,149	0	1,173,149	0	0	0	0	1,173,149	0	1,173,149
Envir Health Support	33,997	2,946	0	36,803	0	36,803	0	36,803	0	0	0	0	36,803	0	36,8...
Facilities Support	197,829	15,994	0	213,994	0	213,994	0	213,994	0	0	0	0	213,994	0	213,994
M & I Routine	148,174	0	0	148,174	0	148,174	0	148,174	0	0	0	0	148,174	0	148,174
M & I Project Pool	92,911	0	0	92,911	0	92,911	0	92,911	0	0	0	0	92,911	0	92,911
CSC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
San Fac Construction	80,028	3,242	0	83,270	0	83,270	0	83,270	0	0	0	0	83,270	(83,270)	0
Equip Replacement	0	34,391	0	34,391	0	34,391	0	34,391	0	0	0	0	34,391	0	34,391
Facilities Total	626,990	57,443	0	686,133	0	686,133	0	686,133	0	0	0	0	686,133	(83,270)	602,863
Grand Total	6,126,994	73,320	1,677,395	9,874,849	0	9,874,849	0	9,874,849	0	0	0	439,782	7,310,411	(99,267)	7,211,144

end

DUCKVLLY\TA972AFA.WB2

[This Page Intentionally Left Blank]

Attachments to Plaintiff's Exhibit 39:
Fiscal Year 1997 Annual Funding Agreement between the United States of America and Cherokee Nation, dated July 24, 1996
[See JA Vol. I, PART 1 for Exhibit 39]

ATTACHMENT "A"

Operations Agreement

The Cherokee Nation agrees to not compact portions of its Information Resources Management (IRM) related tribal shares during the Fiscal Year 1997 AFA period in return for specific information systems technical support and data processing services being provided by the Oklahoma City Area Indian Health Service.

The Cherokee Nation - Tribal Shares Not Compacted:

OKCAO,DMIS/RPMS: Final FY-97 Funds Allocation

THE CHEROKEE NATION

The Cherokee Nation Shall:

Provide onsite/remote technical support services for applications software installation, and training, and ongoing computer systems administration activities.

Provide appropriate measures to ensure systems security is maintained for the RPMS and Office Automation/E-Mail computer systems. This will include appropriate physical security measures, power conditioning for computer systems, computer security awareness training and assignment of end-user system access privileges and daily backup of files/databases in accordance with IHS guidance.

Provide telephone technical support services to the Cherokee Nation and the Oklahoma City Area Indian Health Service, Division of Management Information Systems, through the appropriate manufacturer, for all non-IHS Mumps RPMS software comprising the Cherokee Nation Core RPMS Software Suite.

The Cherokee Nation will implement the Future Systems, Inc. (FSI) Managed Care and the Billing/Accounts Receivable modules at each of its compacted Health Centers.

The Cherokee Nation will bill directly for outpatient Medicare and Oklahoma Medicaid claims under the federal provider number of the Hastings Hospital for the Sallisaw and Stilwell Health Centers.

All requests for specific technical assistance will be made utilizing a certified Banyan message.

OKLAHOMA CITY AREA INDIAN HEALTH SERVICE

Oklahoma City Area Office, Division of Management Information Systems shall:
Provide onsite preventative maintenance services for the five (5) health centers operated by the Cherokee nation for the Resource and Patient Management Systems (RPMS), Local Area Network (LAN), Wide Area Network (WAN) and Office Automation/and E-mail services.

Provide at least one training course for RPMS Computer Systems Administration (site-management) and one training course for LAN/Office Automation/E-Mail computer systems administration during the AFA period.

Provide testing/integration and technical support services for the Cherokee Nation Core RPMS Software Suite which shall include the latest versions of the following RPMS Mumps application software modules and additional IHS RPMS modules once they are verified, certified and released:

Manufacturer	Product Name
IHS	Filemanager
IHS	Kernel
IHS	Laboratory (Clinical)
IHS	X-Ray
IHS	SSN Report Menu
IHS	Q-Man
IHS	National Drug File
IHS	Patient Registration
IHS	Outpatient Pharmacy
IHS	Clinic Scheduling
IHS	Patient Merge
IHS	Medical Staff Credentials
IHS	Quality Assessment & Improvement Management Systems
IHS	Multi-Facility Integration
IHS	All Patient Care Component Modules
IHS	Case Management System
IHS	DRG Grouper
IHS	CDMIS
IHS	Dental Data System
IHS	Immunization Tracking System
IHS	Women's Health Care System (PAP)
IHS	Generic Activity Reporting Systems
FSI	Managed Care System
FSI	Billing/Accounts Receivable System

Provide periodic distributions to the Cherokee Nation tribal office of IHS and non-IHS RPMS software releases and written installation instructions once tested and certified to be compatible with Cherokee Nation test database and the Cherokee Nation Core RPMS Software Suite.

Provide testing/integration and technical support services for the Cherokee LAN/Office Automation/E-Mail Core Suite. The Cherokee LAN/Office Automation/E-Mail Core Suite shall include the latest versions of the following operating software and application software modules:

Manufacturer	Product Name
Banyan	Banyan Operating System
FTP	TCP/IP
Banyan	Beyond Mail
Corel	Word Perfect
Lotus	Lotus 1-2-3 Spread Sheet
Banyan	Banyan Mail
Norman	Norman Data Defense Systems

Provide telephone technical support services, within a 4-hour response time, for RPMS hardware, operating software, and applications software comprising the Cherokee Nation Core RPMS Software Suite.

Provide telephone technical support services, within a 4-hour response time, for hardware, operating software and application software comprising the Cherokee Nation LAN/Office Automation/E-mail Core Suite.

Provide on-site technical support services, within an 8-hour response time, for RPMS hardware, operating software, and applications software comprising the Cherokee Nation Core RPMS Software Suite in instances where operations are totally disabled and telephone assistance is not appropriate to remedy the problem at hand.

Provide on-site technical support services, within an 8-hour response time, for hardware, operating software and application software comprising the Cherokee Nation LAN/Office Automation/E-mail Core Suite in instances where operations are totally disabled and telephone assistance is not appropriate to remedy the problem at hand.

Provide a current printed copy of the files, record and field layouts of the IHS core data set. Provide a monthly magnetic copy of all data submitted by the Cherokee Nation compacted clinics. The data set will be provided in ASCII fixed record length format on computer media mutually agreeable to by the Cherokee Nation and the IHS, Oklahoma City Area Office, Division of Management Information Systems.

Provide a monthly report of the status of all specific requests still in process with a projected completion date. The report will be sent as a certified message utilizing the Banyan system. The report will also list, in summary form, other activities performed for the Cherokee Nation not related to specific requests.

Agrees to provide hardware repair maintenance for all RPMS peripheral equipment, to include equipment purchased and owned by the Nation. (See attached equipment list)

Assist FSI with Business Office inititive to insure integrity of the RPMS database within IHS guidelines.

RPMS Peripherals - Tribally Owned CRT Listing
June 11, 1996

Serial #	Manufacure Code	Model Name	Fed Gov Serial #
0000100305	WYSE	NONE	
00V1025216	WYSE	WY-85	
00V1029386	WYSE	WY-85	
00V1029401	WYSE	WY-85	
00V1029870	WYSE	WY-85	
00V1029914	WYSE	WY-85	
00V1031514	WYSE	WY-85	
01C14A00245	WYSE	WY-60	
01F10900043	WYSE	WY-60	
01F10A03201	WYSE	WY-60	
01F10A03205	WYSE	WY-60	
01F14700844	WYSE	WY-60	
01F14800043	WYSE	WY-60	
01F14800046	WYSE	WY-60	
01F14800047	WYSE	WY-60	
01F14800049	WYSE	WY-60	
01F14800051	WYSE	WY-60	
01F14800053	WYSE	WY-60	
01F14800054	WYSE	WY-60	
01F14800055	WYSE	WY-60	
01F14800056	WYSE	WY-60	
01F14800057	WYSE	WY-60	
01F14800058	WYSE	WY-60	
01F14800060	WYSE	WY-60	
01F14800062	WYSE	WY-60	
01F14800063	WYSE	WY-60	
01F14800066	WYSE	WY-60	
01F14800068	WYSE	WY-60	
01F14800126	WYSE	WY-60	
01F14800128	WYSE	WY-60	
01F14800130	WYSE	WY-60	
01F14800134	WYSE	WY-60	
01F14800136	WYSE	WY-60	
01F14800138	WYSE	WY-60	
01F14801094	WYSE	WY-60	
01F14801103	WYSE	WY-60	
01F14801104	WYSE	WY-60	

01F14801106	WYSE	WY-60
01F14801110	WYSE	WY-60
01F14801111	WYSE	WY-60
01F14801201	WYSE	WY-60
01F14801203	WYSE	WY-60
01F14801204	WYSE	WY-60
01F14801205	WYSE	WY-60
01F14801206	WYSE	WY-60
01F14801207	WYSE	WY-60
01F14801209	WYSE	WY-60
01F14801210	WYSE	WY-60
01F14801211	WYSE	WY-60
01F14801213	WYSE	WY-60
01F14801215	WYSE	WY-60
01F14801216	WYSE	WY-60
01F14801217	WYSE	WY-60
01F14801220	WYSE	WY-60
01F14801412	WYSE	WY-60
01F14801423	WYSE	WY-60
01F14801426	WYSE	WY-60
01F14801428	WYSE	WY-60
01F14801436	WYSE	WY-60
01F14801439	WYSE	WY-60
01F14801469	WYSE	WY-60
01F14801859	WYSE	WY-60
01F15500220	WYSE	WY-60
01F15500222	WYSE	WY-60
01F15500230	WYSE	WY-60
01F15500231	WYSE	WY-60
01F15500241	WYSE	WY-60
01F15500242	WYSE	WY-60
01F15500247	WYSE	WY-60
01F15500252	WYSE	WY-60
01F15500253	WYSE	WY-60
01F15500254	WYSE	WY-60
01F15500256	WYSE	WY-60
01F15500258	WYSE	WY-60
01F15500266	WYSE	WY-60
01F15500269	WYSE	WY-60
01F15500270	WYSE	WY-60
01F15500272	WYSE	WY-60
01F15500273	WYSE	WY-60
01F15500274	WYSE	WY-60
01F15500275	WYSE	WY-60
01F15500276	WYSE	WY-60

01F15500278	WYSE	WY-60
01F15500279	WYSE	WY-60
01F15500280	WYSE	WY-60
01F15600275	WYSE	WY-60
0FR14301241	WYSE	NONE

RPMS Peripherals - Tribally Owned Printer Listing
June 11, 1996

Serial #	Manufacure Code	Model Name	Fed Gov Serial #
005C0343241	OKIDATA	MICROLINE 320	
105C0553615	OKIDATA	MICROLINE 320	
106A0069110	OKIDATA	MICROLINE 391PLUS	
106A0069113	OKIDATA	MICROLINE 391PLUS	
181278	OKIDATA	NONE	
201A0015166	OKIDATA	MICROLINE 184	
203C0700126	OKIDATA	MICROLINE 320	
307C1035873	OKIDATA	MICROLINE 320	
310C1070220	OKIDATA	MICROLINE 320	
402A0018623	OKIDATA	PACEMARK 3410	
402A0018624	OKIDATA	PACEMARK 3410	
402A0018626	OKIDATA	PACEMARK 3410	
402A0018628	OKIDATA	PACEMARK 3410	
402A0018629	OKIDATA	PACEMARK 3410	
402D0525673	OKIDATA	MICROLINE 321	
403D1165118	OKIDATA	MICROLINE 320	
404D0529342	OKIDATA	MICROLINE 321	
405D1193210	OKIDATA	MICROLINE 320	
405D1204996	OKIDATA	MICROLINE 320	
405D1204998	OKIDATA	MICROLINE 320	
407D0545421	OKIDATA	MICROLINE 321	
407D1241680	OKIDATA	MICROLINE 320	
407D1242063	OKIDATA	MICROLINE 320	
407D1242064	OKIDATA	MICROLINE 320	
407D1242068	OKIDATA	MICROLINE 320	
408D1263765	OKIDATA	MICROLINE 320	
408D1263766	OKIDATA	MICROLINE 320	
411D1346084	OKIDATA	MICROLINE 320	
411D1346090	OKIDATA	MICROLINE 320	
412D1002056	OKIDATA	MICROLINE 320	
412D1351607	OKIDATA	MICROLINE 320	
412D1351609	OKIDATA	MICROLINE 320	
412D1351877	OKIDATA	MICROLINE 320	
412D1351878	OKIDATA	MICROLINE 320	

412D1351879	OKIDATA	MICROLINE 320
412D1351880	OKIDATA	MICROLINE 320
412D1351881	OKIDATA	MICROLINE 320
412D1351882	OKIDATA	MICROLINE 320
412D1351883	OKIDATA	MICROLINE 320
412D1351884	OKIDATA	MICROLINE 320
412D1351885	OKIDATA	MICROLINE 320
412D1357308	OKIDATA	MICROLINE 320
412D1357309	OKIDATA	MICROLINE 320
412D1357310	OKIDATA	MICROLINE 320
412D1357311	OKIDATA	MICROLINE 320
412D1357312	OKIDATA	MICROLINE 320
412D1357315	OKIDATA	MICROLINE 320
412D1357318	OKIDATA	MICROLINE 320
412D1357319	OKIDATA	MICROLINE 320
412D1357321	OKIDATA	MICROLINE 320
412D1357322	OKIDATA	MICROLINE 320
412D1357529	OKIDATA	MICROLINE 320
412D1357531	OKIDATA	MICROLINE 320
412D1357534	OKIDATA	MICROLINE 320

CHEROKEE NATION

P.O. Box 948
Tahlequah, OK 74465-0948
918-456-0671

Joe Byrd
Principal Chief

James "Garland" Eagle
Deputy Principal Chief

ATTACHMENT B

June 10, 1996

Randy Grinnell
Acting Area Director
Oklahoma City Area IHS
Five Corporate Plaza
3625 NW 56th Street
Oklahoma City, Oklahoma, 73112-4519

Dear Mr. Grinnell:

The Cherokee Nation plans to compact, for all of the Contract Health Care Program presently serving Indian people in the Tahlequah Service Unit in fiscal year 1997. This includes all of the administrative and program functions. Please provide the Nation with a completed listing of all the resources involved including program and administrative dollars along with distribution methodology and funding calculation. With regard to program dollars, we have enclosed a map showing jurisdiction boundary for purposes of distributing the non-indigenous funding. With respect to the administrative dollars please include, equipment inventory and list of all personnel by name, category, personnel system, and pay (salary and benefits broken down by employee).

Also provide the Nation with an estimate of Tribal Shares (Area and Headquarters) associated with this program.

Please consider this letter as the Cherokee Nation's official letter of intent to Compact under P.L. 93-638, as Amended, for the Contract Health Service Program serving the Tahlequah Service Unit.

We would appreciate receiving this information on or before June 28, 1996, to allow time for review and necessary planning.

If you are unable to meet this time line or have any questions concerning this request, do not hesitate to call Mr. Rick Kelly at (918)-456-0671, ext. 372.

Sincerely,

David Kingfisher

David Kingfisher, MD
Executive Director,
Health Services Division

cc: Max Tahsuda, Director of Tribal Operations, OCAIHS

FY 1997 Tribal Shares — AFA DETAIL REPORT FOR 41 CURRENT TITLE 3s — 05/08/96 02:00 PM

Type / Area	CHEROKEE NATION / COMPACT / Oklahoma AFA	Shares from Program Formula	TSA Pool Funds: $ in Account	% of Asst. Amt.	AFA's % of TSA $	% ppm admin. by tribe	Computed Share of Account	Inter-Tribal Adjustments + or - IF ANY	Shares Eligible for Transfer	Enter Negotiated Amount of F
Computed Shares Available	$1,879,920	A	B	C	D	E	F	G	H	I
LINE										
1	BUDGET ACTIVITY/SERVICE									
2	0									
3	HOSPITALS & CLINICS									
4	A. Emergency Fund		$0					$0		
5	0									
6	B. IHS-Wide Program Requirement									
7	OFFICE OF ADMIN. & MGMT.									
8	Assessments/Bad Supply (12698)		$0					$0		
9	Workmens/Unemploy. Comp. (13665)		$0					$0		
10	Inter-Agency Agreements (41099)		$1,178,200	100%	7.42%	100%	$87,455	($88,358)	$21,088	21094
11	OFFICE OF THE DIRECTOR									
12	Management Initiatives		$0					$0		
13	OFFICE OF HEALTH PROGRAMS									
14	A.C.O.G. Contract		$81,913	100%	7.42%	100%	$6,822	($5,177)	$1,648	1696
15	H.P./D.P. Initiatives		$1,677,758	100%	7.42%	100%	$124,535	($94,494)	$30,041	30 091
16	Indian Children's Program		$0					$0		
17	Model Diabetes		$0					$0		
18	H.E.C.I.		$1,015,649	100%	7.42%	100%	$75,389	($57,203)	$18,186	18136
19	Nurse Initiatives		$1,195,200	100%	7.42%	100%	$88,718	($67,318)	$21,401	21401
20	Nursing Contract		$487,521	100%	7.42%	100%	$34,710	($26,337)	$8,373	8373
21	Senior Citizens		$256,802	100%	7.42%	100%	$18,973	($14,399)	$4,577	4577
22	Epidemiology Center		$0					$0		
23	Emergency Medical Svcs-Phoenix		$298,343	100%	7.42%	100%	$22,145	($16,803)	$5,342	5342
24	Collection & Billing System		$0					$0		
25	OFFICE OF HLTH PROGR, RES. & DVLPMNT									
26	Research Projects		$469,100	100%	7.42%	100%	$34,820	($26,420)	$8,400	8400
27	OFFICE OF HUMAN RESOURCES									
28	A.A.I.P. Contract		$24,981	100%	7.42%	100%	$1,854	($1,407)	$447	447
29	Clinical Support Center-Phoenix		$1,374,757	100%	7.42%	100%	$102,044	($77,428)	$24,616	24616
30	Contract-Non Physicians		$74,000	100%	7.42%	100%	$5,493	($4,168)	$1,326	1326
31	Physician Residency		$254,793	100%	7.42%	100%	$18,913	($14,350)	$4,563	4563
32	Reconstructive/Corrective		$1,198,045	100%	7.42%	100%	$88,979	($67,563)	$21,416	21416
33	U.S.U.H.S., etc.		$2,787,736	100%	7.42%	100%	$207,006	($157,573)	$50,085	50085
34	OFFICE OF INFO. RESOURCES MGMT.									
35	I.R.M. Support Fund		$9,055,300	100%	7.42%	100%	$672,150	($510,010)	$162,141	162141
36	OFFICE OF PLANNING, EVAL & LEGISLATION									
37	Sustention		$1,012,300	100%	7.42%	100%	$75,165	($57,026)	$18,139	18139
38	OFFICE OF TRIBAL ACTIVITIES									
39	National Indian Health Board		$428,534	100%	7.42%	100%	$31,808	($24,136)	$7,673	7673
40	SUB-TOTAL-HOSPITALS & CLINICS									
41	0									
42	HEADQUARTERS WIDE									
43	HDW Administration		$609,454	100%	7.42%	100%	$45,164	($34,269)	$10,895	10895
44	OFFICE OF ADMIN. & MANAGEMENT									
45	Records Management		$0					$0		
46	Supply Management		$0					$0		
47	Property Management		$0					$0		
48	OFFICE OF HEALTH PROGRAMS									
49	Nutrition Training Center		$328,082	100%	7.42%	100%	$24,320	($18,478)	$5,875	5875
50	Diabetes Program		$844,888	100%	7.42%	100%	$70,112	($53,199)	$16,913	16913
51	Cancer Prevention		$608,828	100%	7.42%	100%	$45,169	($34,273)	$10,896	10896
52	Health Records		$83,230	100%	7.42%	100%	$6,528	($5,281)	$1,668	1668
53	AIDS Program		$810,418	100%	7.42%	100%	$48,318	($34,388)	$13,930	13930
54	Handicapped Children		$318,848	100%	7.42%	100%	$23,727	($18,003)	$5,723	5723
55	Traditional Medicine		$93,836	100%	7.42%	100%	$6,964	($5,304)	$1,660	1660

3HQSG97.WK4

FY 1997 Tribal Shares — AFA DETAIL REPORT FOR 41 CURRENT TITLE 3s — 05/08/96 02:00 PM

	CHEROKEE NATION / COMPACT / Oklahoma AFA	Shares from Program Formula	TSA Pool Funds: $ in Account	% of Acct. Avail.	AFA's % of TSA $	% pgm. admin. by tribe	Computed Share of Account	Inter-Tribal Adjustments + or - IF ANY	Shares Eligible for Transfer	Enter Negotiated Amount of F
	Computed Shares Available: $1,879,920	A	B	C	D	E	F	G	H	I
54	OFFICE OF HUMAN RESOURCES									
55	Personnel Management		$123,033	100%	7.42%	100%	$9,132	($6,929)	$2,203	2203
56	OFFICE OF INFORM. RES. MANAGEMENT									
57	RPMS		$6,027,827	100%	7.42%	100%	$447,437	($339,503)	$107,934	107934
58	SUB-TOTAL-HOSPITALS & CLINICS HDW									
59	OFFICE OF HLTH PROGR. RES. & DVLPMT									
60	Staff & Operations		$1,499,893	100%	7.42%	100%	$111,333	($84,476)	$26,857	26857
61	GRAND TOTAL - HOSPITALS & CLINICS									
62	0									
63	DENTAL PROGRAM:									
64	Training		$186,000	100%	7.42%	100%	$13,806	($7,605)	$6,201	6201
65	R.P.M.S.		$38,000	100%	7.42%	100%	$2,821	($1,554)	$1,267	1267
66	Consultive Travel		$150,900	100%	7.42%	100%	$11,209	($6,538)	$5,331	5331
67	Research		$46,000	100%	7.42%	100%	$3,414	($1,881)	$1,534	1534
68	Recruitment		$155,000	100%	7.42%	100%	$11,506	($6,338)	$5,168	5168
69	Printing		$77,000	100%	7.42%	100%	$5,716	($3,148)	$2,567	2567
70	Trainee Assistance		$510,000	100%	7.42%	100%	$37,856	($20,853)	$17,003	17003
71	TOTAL - DENTAL PROGRAM									
72	0									
73	MENTAL HEALTH PROGRAM:									
74	Technical Assistance		$1,279,200	100%	7.42%	100%	$94,952	($4,055)	$90,896	90896
75	C.M.I. Grants		$200,000	100%	7.42%	100%	$14,845	($634)	$14,211	14211
76	National Conference		$102,500	100%	7.42%	100%	$7,608	($325)	$7,283	7283
77	TOTAL - MENTAL HEALTH									
78	0									
79	ALCOHOL/SUBSTANCE ABUSE:									
80	Technical Assistance		$1,397,000	100%	7.42%	100%	$103,696	($0)	$103,696	103696
81	F.A.S. C.D.C. M.O.A.		$340,000	100%	7.42%	100%	$25,237	($0)	$25,237	25237
82	Department of Labor Grant		$20,000	100%	7.42%	100%	$1,485	($0)	$1,485	1485
83	PCP Training		$180,000	100%	7.42%	100%	$13,361	($0)	$13,361	13361
84	F.A.S.-Washington University		$0					$0		
85	Gallup		$0					$0		
86	Child Abuse Initiative		$1,771,000	100%	7.42%	100%	$131,457	($0)	$131,457	131457
87	Tobacco Cessation		$0					$0		
88	Home for the Road		$150,000	100%	7.42%	100%	$11,134	($0)	$11,134	11134
89	CDWIS Support Funds		$130,000	100%	7.42%	100%	$9,650	($0)	$9,650	9650
90	BHAIS Conference		$60,000	100%	7.42%	100%	$4,454	($0)	$4,454	4454
91	BIA Newsletter		$4,000	100%	7.42%	100%	$297	($0)	$297	297
92	Trainee Methadone Program		$0					$0		
93	Winnebago Diabetic Project		$0					$0		
94	Tribe HCRC Substance Abuse		$0					$0		
95	Counselor Certification Initiative		$60,000	100%	7.42%	100%	$4,454	($0)	$4,454	4454
96	Rapid City Detox Project		$0					$0		
97	Clinical Supervision Training		$8,000	100%	7.42%	100%	$594	($0)	$594	594
98	Subsidy Protocol Standards		$15,000	100%	7.42%	100%	$1,113	($0)	$1,113	1113
99	DHHS Spousal Int. - Albuquerque		$0					$0		
100	DHHS Spousal Int. - Aberdeen		$0					$0		
101	TOTAL - ALCOHOL/SUBSTANCE ABUSE									
102	0									
103	PUBLIC HEALTH NURSING:									
104	Preventive Health Initiatives		$470,000	100%	7.42%	100%	$34,878	($2,814)	$31,963	31963
105	TOTAL - PUBLIC HEALTH NURSING									
106	0									
107	HEALTH EDUCATION:									
108	HIV Prevention Initiative		$535,000	100%	7.42%	100%	$38,712	($0)	$38,712	38712
109	Physical Fitness Initiative		$325,000	100%	7.42%	100%	$24,124	($0)	$24,124	24124

FY 1997 Tribal Shares — AFA DETAIL REPORT FOR 41 CURRENT TITLE 3s — 05/08/96 02:00 PM

	CHEROKEE NATION / COMPACT / Oklahoma AFA	Shares from Program Formula	TSA Pool Funds: $ in Account	% of Acct. Avail.	AFA's % of TSA $	% pgm. admin. by tribe	Computed Share of Account	Inter-Tribal Adjustments + or - IF ANY	Shares Eligible for Transfer	Enter Negotiated Amount of F
	Computed Shares Available: $1,879,920	A	B	C	D	E	F	G	H	I
110	Patient Education Demonstration Project		$80,000	100%	7.42%	100%	$6,880	($0)	$6,880	6880
111	Networking & Advocacy		$50,000	100%	7.42%	100%	$3,711	($0)	$3,711	3711
112	Strategic Planning Initiative		$81,700	100%	7.42%	100%	$6,064	($0)	$6,064	6064
113	TOTAL - HEALTH EDUCATION									
114	0									
115	COMMUNITY HLTH REPRESENTATIVES:									
116	CHR Training Program		$1,105,400	100%	7.42%	100%	$82,051	($0)	$82,051	82051
117	CHR-Patient Care Component (PCC) Support		$770,700	100%	7.42%	100%	$57,207	($0)	$57,207	57207
118	Traditional Health Care Practices Promotion		$126,500	100%	7.42%	100%	$9,390	($0)	$9,390	9390
119	Uniband Contract		$240,000	100%	7.42%	100%	$17,815	($0)	$17,815	17815
120	Technical Support (MOU w/O.I.R.M.)		$52,500	100%	7.42%	100%	$3,897	($0)	$3,897	3897
121	TOTAL - CHR									
122	0									
123	INDIAN HEALTH PROFESSIONS:									
124	Sec. 102 - Recruitment Program		$0					$0		
125	Sec. 105 - Extern Program		$0					$0		
126	Sec. 103 - Preparatory Program		$0					$0		
127	Sec. 104 - Scholarship Program		$0					$0		
128	Indians into Psychology		$0					$0		
129	Sec. 116 - Tribal Recruitment/Retention		$0					$0		
130	Sec. 112 - Nursing Program		$0					$0		
131	Sec. 114 - IHMED Replic. Program		$0					$0		
132	Sec. 108 - Loan Repayment Program		$0					$0		
133	TOTAL - INDIAN HEALTH PROFESSIONS									
134	0									
135	TRIBAL MANAGEMENT:									
136	Tribal Management Grants		$0					$0		
137	TOTAL - TRIBAL MANAGEMENT									
138	0									
139	DIRECT OPERATIONS:									
140	OFFICE OF THE DIRECTOR		$792,850	100%	7.42%	100%	$58,804	($41,178)	$16,916	16916
141	OFFICE OF ADMIN. & MANAGEMENT		$2,407,448	100%	7.42%	100%	$178,688	($126,665)	$52,034	52034
142	OFFICE OF PLANNING, EVAL & LEGISLTN		$1,170,550	100%	7.42%	100%	$86,867	($61,567)	$25,300	25300
143	OFFICE OF INFO. RESOURCES MGMT		$2,237,880	100%	7.42%	100%	$166,050	($117,699)	$48,351	48351
144	OFFICE OF TRIBAL ACTIVITIES		$403,850	100%	7.42%	100%	$29,962	($21,238)	$8,724	8724
145	OFFICE OF HUMAN RESOURCES		$1,716,050	100%	7.42%	100%	$127,373	($90,283)	$37,090	37090
146	OFFICE OF HEALTH PROGRAMS		$2,726,050	100%	7.42%	100%	$202,347	($143,428)	$58,920	58920
147	OFFICE OF HLTH PROGR. RES. & DVLPMT		$488,800	100%	7.42%	100%	$36,267	($25,707)	$10,560	10560
148	HEADQUARTERS WEST		$1,888,700	100%	7.42%	100%	$125,422	($88,901)	$36,520	36520
149	TOTAL - DIRECT OPERATIONS									
150	0									
151	CONTRACT SUPPORT COSTS:									
152	Contract Support Costs - Services Appr.		$0					$0		
153	ISDA-Indian Self-Determination-HS000 Appr.		$0					$0		
154	TOTAL-CONTRACT SUPPORT COSTS									
155	0									
156	CONTRACT HEALTH SERVICE:									
157	Fiscal Intermediary		$0					$0		
158	Quality Assurance		$0					$0		
159	Deferred Services		$0					$0		
160	C.H.S. Reserve & Undistributed		$1,413,900	100%	7.42%	100%	$104,950	($88,510)	$16,440	16440
161	CHSF 20000 Account Funds		$0					$0		
162	TOTAL-CONTRACT HEALTH SERVICE									
163	0									
164	INDIAN HEALTH FACILITIES									
165	O.E.H.E. SUPPORT:									

FY 1997 Tribal Shares — AFA DETAIL REPORT FOR 41 CURRENT TITLE 3s — 05/08/96 02:00 PM

	CHEROKEE NATION / COMPACT / Oklahoma AFA	Shares from Program Formula	TSA Pool Funds: $ in Account	% of Acct. Avail	AFA's % of TSA $	% pgm. admin. by tribe	Computed Share of Account	Inter-Tribal Adjustments + or - IF ANY	Shares Eligible for Transfer	Enter Negotiated Amount of F
	Computed Shares Available: $1,879,920	A	B	C	D	E	F	G	H	I
166	San. Facilities Constr. Support	$19,241		$0				$0	$19,241	19241
167	Environ. Health Services Support	$14,013		$0				$0	$14,013	14013
168	Facilities & Real Property Support	$13,170		$0				$0	$13,170	13170
169	Facilities Plan & Constr. Support	$0		$0				$0	$0	
170	Engineering Services Support	$16,850		$0				$0	$16,850	16850
171	0									
172	FUNDS MANAGED BY HQ FOR AREA/PROJECTS									
173	Reimbursements			$0				$0		
174	Environmental Health Support			$0				$0		
175	Facilities Support			$0				$0		
176	Maintenance & Improvement			$0				$0		
177	Sanitation Facilities			$0				$0		
178	Health Care Facilities		139,384	$0				$0		
179	Equip Replacement Requirement ★	$123,245		$0				$0	$123,245	139384
180	TOTAL - INDIAN HEALTH FACILITIES									
181	0									
182	TOTAL HEADQUARTERS-EST. FY 1997	187,019	60,296,673				4,475,658	(2,782,758)	1,879,920	0
183	BASED ON CONFERENCE & SPRING									

★ Figure from OEHE for Equipment Replacement + ... Total $1,895,561

Tables attached to Defendants' Exhibit: Declaration of Carl L. Fitzpatrick, Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service, dated Sept. 3, 1999

[See JA Vol. I, PART 1 for Declaration of Carl L. Fitzpatrick]

ח

INDIAN HEALTH SERVICE

DETAIL OF CHANGES

(Dollars in Thousands)

File: [illegible] 10/05/95

Sub Sub Activity	FY 1995 Approp.	Adjustment	FY 1995 Base	Mandatories	FY 1996 Calculated Current Services	FY 1995/ FY 1996 Staffing for New Fac.	Total Program Decreases	Total Program Increases	Reprogrammed Offsets 1/	FY 1996 CONFERENCE MARK
Hospital & Health Clinic	823,866	0	823,866	0	823,866	8,991	(400)	2,250	0	834,707
Dental Services	57,518	0	57,518	0	57,518	767	0	0	0	58,285
Mental Health	36,448	0	36,448	0	36,448	376	0	0	0	36,824
Alcohol & Substance Abuse	91,352	0	91,352	0	91,352	0	0	0	0	91,352
Contract Health Services	362,564	0	362,564	0	362,564	0	0	0	0	362,564
Total, Clinical Service	1,371,748	0	1,371,748	0	1,371,748	10,134	(400)	2,250	0	1,383,732
Public Health Nursing	23,505	0	23,505	0	23,505	229	0	0	0	23,734
Health Education	8,244	0	8,244	0	8,244	69	0	0	0	8,313
Comm. Health Reps	43,955	0	43,955	0	43,955	0	0	0	0	43,955
Immunization AK	1,328	0	1,328	0	1,328	0	0	0	0	1,328
Total, Prev Hlth	77,032	0	77,032	0	77,032	298	0	0	0	77,330
Urban Health	23,349	0	23,349	0	23,349	0	0	0	0	23,349
Indian Health Professions	28,044	0	28,044	0	28,044	0	(2,000)	200	0	26,244
Tribal Management	5,348	0	5,348	0	5,348	0	(3,000)	0	0	2,348
Direct Operations	49,709	0	49,709	0	49,709	0	(2,000)	0	0	47,709
Self Governance	9,090	0	9,090	0	9,090	0	0	0	0	9,090
Contract Support Cost	145,460	0	145,460	7,500	152,960	80	0	0	0	153,040
Total, Services	1,709,780	0	1,709,780	7,500	1,717,280	10,512	(7,400)	2,450	0	1,722,842
Facilities:										
Maint. & Improvement	38,334	0	38,334	0	38,334	0	0	0	0	38,334
Sanitation Facilities										
New/Renovated	42,397	0	42,397	0	42,397	0	0	0	0	42,397
Existing	42,492	0	42,492	0	42,492	0	0	0	0	42,492
Total Sanitation	84,889	0	84,889	0	84,889	0		0	0	84,889
Hlth Care Facs. Constr.	27,822	(27,822)	0	0	0	0	0	12,964	(667)	12,297
Facil. & Envir. Hlth Supp										
Fac. Support	38,294	0	38,294	0	38,294	301	0	0	0	38,595
Env. Health Support	40,314	0	40,314	0	40,314	0	0	500	0	40,814
OEHE Support	10,172	0	10,172	0	10,172	0	0	400	0	10,572
Total, F&EHS	88,780	0	88,780	0	88,780	301	0	900	0	89,981
Equipment	12,975	0	12,975	0	12,975	0	0	0	0	12,975
Contract Support Cost	482	0	482	0	482	0	0	0	0	482
Total, Facilities	295,282	(27,822)	267,460	0	267,460	301	0	13,864	(667)	280,958
Total, IHS	2,005,062	(27,822)	1,977,240	7,500	1,984,740	10,813	(7,400)	16,314	(667)	2,003,800
Collections:										
Medicare/Medicaid	175,000	0	175,000	1,536	176,536	0	0	0	0	176,536
Private Insurance	33,556	0	33,556	228	33,784	0	0	0	0	33,784
Quarters	4,500	0	4,500	0	4,500	0	0	0	0	4,500
Total, Collections	213,056	0	213,056	1,764	214,820	0	0	0	0	214,820
GRAND TOTAL	2,178,118	(27,822)	2,150,296	9,264	2,187,560	10,813	(7,400)	16,314	(667)	2,176,620

1/ Reprogrammed $667,000 from stalled or lapsed projects: Fort Yuma, $667,000.

INDIAN HEALTH SERVICE

DETAIL OF CHANGES

Sub Sub Activity	PROGRAM DECREASES: For OBAH Staffing Transfer	Indian Health Prof.	Tribal Mgmt.	Direct Operations Reduction	Total Program Decreases	PROGRAM INCREASES: Collect/ Billing System	Epidem- iology Center	Indians into Psy- chology	Injury Prev.	White Earth MH	Hays MT	AHEC Moving Cost	Amb Care Fac. Grants	Modular Dental Units	For OBAH Staffing Transfer	Total Program Increases
Hospital & Health Clinic -	(400)	0	0	0	(400)	1,500	750	0	0	0	0	0	0	0	0	2,250
Dental Services	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Mental Health	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Alcohol & Substance Abuse	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Contract Health Services	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total, Clinical Services	(400)	0	0	0	(400)	1,500	750	0	0	0	0	0	0	0	0	2,250
Public Health Nursing	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Health Education	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Comm. Health Reps	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Immunization AK	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total, Prev Hlth	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Urban Health	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Indian Health Professions	0	(2,000)	0	0	(2,000)	0	0	200	0	0	0	0	0	0	0	200
Tribal Management	0	0	(5,000)	0	(5,000)	0	0	0	0	0	0	0	0	0	0	0
Direct Operations	0	0	0	(2,000)	(2,000)	0	0	0	0	0	0	0	0	0	0	0
Self Governance	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Contract Support Cost	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total, Services	(400)	(2,000)	(5,000)	(2,000)	(7,400)	1,500	750	200	0	0	0	0	0	0	0	2,450
Facilities:																
Maint. & Improvement	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sanitation facilities																
New/Renovated	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Existing	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total Sanitation	0	0	0	0		0	0	0	0	0	0	0	0	0	0	0
Hlth Care Facs. Constr.	0	0	0	0	0	0	0	0	0	8,938	2,216	750	0	1,000	0	12,944
Facil. & Envir. Hlth Supp																
Fac. Support	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Env. Health Support	0	0	0	0	0	0	0	0	500	0	0	0	0	0	0	500
OEHE Support	0	0	0	0	0	0	0	0	0	0	0	0	0	0	400	400
Total, FESH	0	0	0	0	0	0	0	0	500	0	0	0	0	0	400	900
Equipment	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Contract Support Cost	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total, Facilities	0	0	0	0	0	0	0	0	500	8,938	2,216	750	0	1,000	400	13,844
Total, IHS	(400)	(2,000)	(5,000)	(2,000)	(7,400)	1,500	750	200	500	8,938	2,216	750	0	1,000	400	16,294
Collections:																
Medicare/Medicaid	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Private Insurance	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Quarters	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total, Collections	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GRAND TOTAL	(400)	(2,000)	(5,000)	(2,000)	(7,400)	1,500	750	200	500	8,938	2,216	750	0	1,000	400	16,294

INDIAN HEALTH SERVICE

Proposed Re-alignment of the FY 1997 Conference Mark

(Dollars in Thousands)

Sub Sub Activity	FY 1996 Approp. w/ $25M Redistribution	Adjust-ment	Health Initiatives	Fixed Costs	Personnel Related Cost	Indian Self-Determ.	Annual Of Staff For New Fac. 3/	New and Expanded Tribes	PHN Initiative	Comm. Health Aides Prog.	Indian Health Profession	Urban Health Initiative	Contract Support Cost	Maint. And Improve.	Sanitation Facilities	Equipment Per ANMC	Modular Dental Units	Lease Decr	FY 1997 Conf. Mark
Hospitals & Health Clinics	854,478 1/	0	2,533	1,887 2/	9,100	0	22,326 4/	0	0	500	0	0	0	0	0	0	0	0	890,824
Dental Services	59,770	0	0	0	910	0	2,103	0	0	0	0	0	0	0	0	0	0	0	62,783
Mental Health	37,200	0	0	0	390	0	751	0	0	0	0	0	0	0	0	0	0	0	38,341
Alcohol & Substance Abuse	91,352	0	0	0	130	0	0	0	0	0	0	0	0	0	0	0	0	0	91,482
Contract Health Services	362,564	0	0	2,535	26	0	0	3,200	0	0	0	0	0	0	0	0	0	0	368,325
Total, Clinical Svcs	1,405,364	0	2,533	4,422	10,356	0	25,180	3,200	0	500	0	0	0	0	0	0	0	0	1,451,755
Public Health Nursing	24,150	0	0	0	390	0	1,136	0	1,000	0	0	0	0	0	0	0	0	0	26,676
Health Education	8,313	0	0	0	65	0	254	0	0	0	0	0	0	0	0	0	0	0	8,632
Comm. Health Reps	43,955	0	0	0	0	0	18	0	0	0	0	0	0	0	0	0	0	0	43,973
Immunization AK	1,328	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1,328
Total, Prev Hlth	77,746	0	0	0	455	0	1,408	0	1,000	0	0	0	0	0	0	0	0	0	80,609
Urban Health	23,768	0	0	0	0	0	0	0	0	0	0	1,000	0	0	0	0	0	0	24,768
Indian Health Professions	26,244	0	0	0	26	0	0	0	0	0	2,000	0	0	0	0	0	0	0	28,270
Tribal Management	2,348	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2,348
Direct Operations	47,709	0	0	0	1,000	0	0	0	0	0	0	0	0	0	0	0	0	0	48,709
Self Governance	9,090	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	9,090
Contract Support Costs	153,040	0	0	0	0	7,500	120	0	0	0	0	0	60	0	0	0	0	0	160,720
Total, Services	1,745,309	0	2,533	4,422	12,037	7,500	26,708	3,200	1,000	500	2,000	1,000	60	0	0	0	0	0	1,806,269
Facilities:																			
Maint. & Improvement	38,334	0	0	0	0	0	0	0	0	0	0	0	0	1,000	0	0	0	0	39,334
Sanitation Facilities																			
New/Renovated	42,397	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	42,397
Existing	42,492	0	0	0	0	0	0	0	0	0	0	0	0	0	3,000	0	0	0	45,492
Total Sanitation	84,889	0	0	0	0	0	0	0	0	0	0	0	0	0	3,000	0	0	0	87,889
Hlth Care Facs. Constr.	12,297	(12,297)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1,000	13,500	14,500
Facil. & Envir. Hlth Sup																			
Fac. Support	38,460	0	0	0	378	0	0	0	0	0	0	0	0	0	0	0	0	0	38,838
Env. Health Support	40,645	0	304	0	525	0	0	0	0	0	0	0	0	0	0	0	0	0	41,474
OEHE Support	10,572	0	0	0	137	0	0	0	0	0	0	0	0	0	0	0	0	0	10,709
Total, FA&EHS	89,677	0	304	0	1,040	0	0	0	0	0	0	0	0	0	0	0	0	0	91,021
Equipment	12,973	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1,530	0	0	14,503
Contract Support Costs	482	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	482
Total, Facilities	238,654	(12,297)	304	0	1,040	0	0	0	0	0	0	0	0	1,000	3,000	1,530	1,000	13,500	247,731
Total, IHS	1,983,963	(12,297)	2,837	4,422	13,077	7,500	26,708	3,200	1,000	500	2,000	1,000	60	1,000	3,000	1,530	1,000	13,500	2,054,000

1/ $1.1M of the $25M redistribution located in H&C is for OEHE.

2/ $82K will be reimbursed to the Facilities appropriation IAW instructions in the Conference Report.

3/ Funding for staffing of new facilities includes: Kotzebue ($2.3M); Shiprock ($4M); ANMC ($18.3M); Hays ($1.8M); Harlem ($51K); and White Earth ($294K).

4/ $42K for staffing of new facilities under Facilities Support is located in H&C.

Hospitals & Clinics
Reserve Funds

	Directors Emergency Fund	Advice Date	HPCP Initiatives	Advice Date	Nodal Disorders	Advice Date	Nursing Initiatives	Advice Date	Epidemiology Center	Advice Date	Collection & Billing System	Advice Date	Research Projects	Advice Date	CCDTEPS Non-Physician	Advice Date	Recruitment & Retention IV	Advice Date	Graduation	Advice Date	HSC Reserve Totals
Beginning Balance	$4,000,000		$636,809		$225,733		$1,175,000		$750,000		$1,500,000		$499,100		$74,000		$1,787,100		$1,012,300		$11,071,033
Less: Tribal Shares Title III	0		0		0		(328,832) 3/13		0		0		(139,057) 3/13		(20,588) 3/13		(229,057)	9/13	(276,566) 3/13		(1,065,000)
Return/Additional Title III Funding	0		0		0		93,847 7/10		0		0		21,878 7/10		3,939 7/10		63,091	7/10	63,213 7/10		245,968
Less: Tribal Shares Title I-Round I	0		(45,319) 9/13		(3,047) 9/13		(38,208) 9/13		0		0		(9,218) 6/13		(1,488) 9/13		(20,958)	9/13	(16,882) 9/13		(133,619)
Less: Tribal Shares Title I-Round II	0		(10,938) 6/5		(2,070) 6/5		(16,699) 6/5		0		0		(6,072) 6/9		(1,158) 6/5		(8,901)	6/5	(13,012) 6/5		(81,497)
Less: Funding Trial (now Title I-Round III & IV	0		(60,695) 9/1		(5,017) 9/1		(37,640) 9/4		0		0		(16,264) 9/4		(2,349) 9/4		(18,634)	9/4	(36,171) 9/1		(217,230)
Revised Reserve Balance	4,000,000		518,788		213,073		848,174		750,000		1,500,000		333,588		52,356		1,261,241		718,782		10,284,705
	(87,579) 11/29 87,579 9/13 (117,000) 9/18 (113,000) 9/26 (33,000) 7/19 (600,000) 9/24 (360,000) 9/4		(5,000) 3/15 (63,400) 3/8 (10,000) 5/13 (410,313) 9/19 (60) 9/21		(100,000) 6/7 (83,075) 7/17		(305,360) 3/1 (254,895) 9/21 30,000 9/13 (122,000) 7/17 (142,950) 9/13 (25,000) 9/12		(150,000) 7/17 (40,000) 9/5 (500,000) 9/26		(30,000) 9/19 (35,875) 7/17 (20,000) 8/9 (1,000,000) 9/4 8,700 9/4 (75,000) 9/12 (100,000) 9/12 (269,275) 9/23		(70,000) 3/26 (263,954) 9/5 (10) 9/25		(53,543) 9/8 1,000 9/15 (3) 9/21		(1,125) (1,425) (10,000) (5,000) (225,225) (25,000) (50) (8,100) (825) (44,950) (2,500) (12,500) (234,125) (500) (49,000) (568,575) (55,000) (77,000) (770) (3,225) (32,641)	2/10 3/20 3/20 3/1 3/13 3/21 3/28 4/24 5/23 5/28 6/7 6/13 7/1 7/10 7/17 7/24 8/5 8/15 8/28 9/1 9/17	(302,000) 3/4 (3,000) 3/13 (83,225) 4/24 (25,000) 5/1 (59,400) 5/23 (70) 6/7 (50,000) 6/28 (50,000) 6/28 (25,000) 7/1 (44,975) 7/24 (30,875) 8/28 30,000 9/28 (75,366) 9/4	(1,130,697) (668,000) (775,391) (1,884,463) (430,900) (725,070) (300,000) (267,375) (35,875) (99,825) (32,975) 22,950 (309,510) (500) (49,000) (568,575) (55,000) (77,000) (770) (3,225) (32,641)
Balance Avail.	2,776,421	0	0	25,124	60,000	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2,861,534

-2,104,600 9/2
- 669,800 9/2
-0-

-25,124 9/27 -60,000 9/27
-0- -0-

- 42,000 9/27

3,337,521 Reserve Balance 9/25
312,400 Appreciation Awards held in reserve for CBDHE use
113,600 Reserve Awards held in reserve for CBDHE use (SW Sewing HD Share)
2,861,534 Balance Available

-2,861,534
-0-

as of 9/27
Balance is zero

Dental
Reserve Funds

	Training	Advice Date	RPMS	Advice Date	Consultant Travel	Advice Date	Research	Advice Date	Recruitment	Advice Date	Printing	Advice Date	Technical Assistance	Advice Date	Dental Reserve Totals
Beginning Balance	$186,000		$38,000		$159,900		$46,000		$155,000		$77,000		$510,000		$1,171,900
Less: Proposed Tribal Shares Title III	(51,175)	3/13	(10,457)	3/13	(43,587)	3/13	(12,656)	3/13	(42,645)	3/13	(21,188)	3/13	(140,313)	3/13	($322,016)
Return/Additional Title III Funding	8,039	7/10	1,643	7/10	6,506	7/10	1,967	7/10	6,700	7/10	3,328	7/10	22,036	7/10	$50,241
Less: Tribal Shares Title I-Round I	(3,742)	8/13	(259)	8/13	(3,216)	8/13	(925)	8/13	(3,117)	8/13	(1,548)	8/13	0		($12,807)
Less: Tribal Shares Title I-Round II	(2,910)	8/5	(595)	8/5	(2,503)	8/5	(719)	8/5	(2,424)	8/5	(1,205)	8/5	(356)	8/5	($10,712)
Less: Pending Trbl Shrs Title I-Round III & IV	(5,904)	9/4	(1,207)	9/4	(5,076)	9/4	(1,460)	9/4	(4,920)	9/4	(2,444)	9/4	(762)	9/4	($21,773)
Revised Reserve Balance	130,308		27,125		112,024		32,228		108,594		53,945		390,607		854,831
	(5,066)	5/28	(19,943)	5/28	(10,000)	2/15	(24,145)	5/28	(60,000)	5/28	(40,414)	5/28	(64,400)	1/24	(243,968)
	(5,057)	5/28	(6,000)	7/17	(74,333)	5/28	(6,810)	8/15	(1,355)	5/28	(13,531)	8/15	(26,800)	2/9	(133,886)
	(122,973)	7/17	(311)	9/12	(27,027)	7/17			(27,239)	8/15			(22,800)	4/11	(200,350)
			(20)	9/17									(8,000)	4/19	(8,020)
													(78,000)	5/7	(78,000)
													75,000	5/23	75,000
													(40,667)	5/28	(40,667)
													(170,000)	5/28	(170,000)
													(30,855)	5/28	(30,855)
													(3,185)	5/28	(3,185)
													(20,920)	8/15	(20,920)
Balance Avail.	(2,788)		851		664		1,273		0		0		0		0

0 Bal Rec/NR summ @ 9/18
Balance Available

09/14/96

Mental Health
Reserve Funds

	C.M.I. Grants	Advice Date	National Conference	Advice Date	Mental Health Reserve Totals
Beginning Balance	$600,000		$102,500		$702,500
Less: Proposed Tribal Shares Title III	(55,025)	3/13	(28,198)	3/13	($83,223)
Return/Additional Title III Funding	1,510	7/10	1,320	7/10	$2,830
Less: Tribal Shares Title I-Round I	(4,806)	6/13	(2,465)	6/13	($7,271)
Less: Tribal Shares Title I-Round II	(1,267)	8/5	(649)	8/5	($1,916)
Less: Pending Trbl Shrs Title I-Round III & I	(8,211)	9/4	(4,208)	9/4	($12,419)
Revised Reserve Balance	532,201		68,300		600,501
	(535,200)	7/24	(53,800)	5/21	(589,000)
			(9,775)	7/24	(9,775)
			(1,726)	9/12	(1,726)
	($2,999)		$2,999		$0 ✓

0 Bal Rec/NR summ @ 9/13
Balance Available

Alcohol/Substance Abuse Reserve Funds

	Training	Advice Date	FAS/ CDC/ MOA	Advice Date	FAS Washington University	Advice Date	Information Systems	Advice Date	MOA/SIA & SAMSHA	Advice Date	Research/ Evaluation Project	Advice Date	RTC Adolescent Placement	Advice Date	Outpatient Treatment Initiative	Advice Date	Tele-Medicine Consultation	Advice Date	Wahpeton SU Support Services	Advice Date	New Tribes	Advice Date	Alcohol/ Sub. Abuse Reserve Totals
Beginning Balance	$559,111		$357,671		$131,138		$218,680		$150,000		$250,000		$80,000		$100,000		$100,000		$100,000		$150,000		$2,194,600
Less: Proposed Tribal Shares Title III	(153,819)	3/13	(98,402)	3/13	0		(58,613)	3/13	(41,271)	3/13	(68,781)	3/13	(22,009)	3/13	(27,512)	3/13	(27,512)	3/13	0		0		(498,919)
Return/Additional Title III Funding	(145,790)	7/10	(7,750)	7/10	0		24,301	7/10	23,761	7/10	68,781	7/10	22,009	7/10	(13,588)	7/10	(72,488)	7/10	0		(150,000)	7/10	(250,782)
Less: Tribal Shares Title I-Round I	(32,880)	6/13	(50,132)	6/13	0		(18,850)	6/13	(9,430)	6/13	(34,784)	6/13	(8,692)	6/13	(21,729)	6/13	0		0		0		(178,597)
Less: Tribal Shares Title I-Round II	(1,412)	8/5	(2,155)	8/5	0		(820)	8/5	(409)	8/5	(11,218)	8/5	(380)	8/5	(950)	8/5	0		0		0		(17,348)
Less: Pending Trbl Shrs Title I-Round III & IV	(12,251)	9/4	(15,550)	9/4	0		(4,126)	9/4	(2,031)	9/4	(95,190)	9/4	(4,512)	9/4	(4,781)	9/4	0		0		0		(138,421)
Revised Reserve Balance	212,959		183,882		131,138		157,487		120,623		108,808		86,418		31,482		0		100,000		0		1,112,555
	(210,000)	7/1	(86,271)	4/24	(131,138)	8/7	(80,000)	7/1	(78,729)	4/24	(105,000)	7/1	(68,416)	8/28	(22,677)	8/28			(90,000)	7/1			(670,231)
	(9,430)	7/1	(35,000)	4/24			(77,487)	8/28	(20,870)	7/1	(38,440)	8/28											(180,907)
			(25,000)	7/1																			(25,000)
			(27,000)	9/17																			(27,000)
	(6,471)		10,411		0		0		21,324		(34,632)		0		8,785		0		10,000		0		9,417

-9,417 9/26
994

9,417 REC/NR Burrn @ 9/23
Balance Available

-9417
-0-

429

as of 9/27
Balance is zero

C
C
C

	9,417.0000	+
PORT	4,000.0000	-
OK	753.0000	-
TBL ACT PLAN NAME	2,000.0000	-
	2,664.0000	-
NQWPB	0.0000	*

Public Health Nursing
Reserve Funds

	Preventive Health Initiative	Advice Date	Public Health Nursing Reserve Totals
Beginning Balance	$870,000		$870,000
Less: Proposed Tribal Shares Title III	(239,353)	3/13	(239,353)
Return/Additional Title III Funding	4,696	7/10	4,696
Less: Tribal Shares Title I-Round I	(32,024)	6/13	(32,024)
Less: Tribal Shares Title I-Round II	(5,511)	8/5	(5,511)
Less: Pending Trbl Shrs Title I-Round III & I	(35,716)	9/4	(35,716)
Revised Reserve Balance	562,092		562,092
	(308,800)	3/4	(308,800)
	(172,000)	7/17	(172,000)
	(30,500)	8/15	(30,500)
	(25,000)	8/28	(25,000)
	(25,000)	9/12	(25,000)
Balance Avail.	792		792
	-792	9/27	-792
	-0-		-0-

792 Bal Rec/NR Summ @ 9/13
Balance Available

as of 9/27 Balance is Zero

09/24/98

Health Education
Reserve Funds

	HIV Prevention Initiative	Advice Date	Physical Fitness Initiative	Advice Date	Patient Education Demonstration Project	Advice Date	Networking & Advocacy	Advice Date	Strategic Planning Initiative	Advice Date	Health Education Reserve Totals
Beginning Balance	$535,000		$325,000		$90,000		$50,000		$81,700		$1,081,700
Less: Proposed Tribal Shares Title III	(147,187)	3/13	(89,415)	3/13	(24,759)	3/13	(13,759)	3/13	(22,477)	3/13	(297,597)
Return/Additional Title III Funding	3,169	7/10	1,930	7/10	530	7/10	297	7/10	483	7/10	6,409
Less: Tribal Shares Title I-Round I	(81,243)	6/13	(49,347)	6/13	(13,687)	6/13	(7,592)	6/13	(12,404)	6/13	(164,253)
Less: Tribal Shares Title I-Round II	(3,390)	8/5	(2,058)	8/5	(570)	8/5	(317)	8/5	(518)	8/5	(6,853)
Less: Pending Trbl Shrs Title I-Round III & IV	(21,984)	9/4	(13,342)	9/4	(3,695)	9/4	(2,054)	9/4	(3,354)	9/4	(44,409)
Revised Reserve Balance	284,385		172,768		47,839		26,575		43,430		574,997
	(1,200)	2/15	(85,000)	3/26	(2,200)	2/15	(5,000)	2/15	(10,650)	5/28	(104,050)
	(6,200)	2/15	(27,900)	7/10	(550)	2/15	(425)	2/15	(7,000)	8/7	(42,075)
	(1,075)	3/4			(30,000)	3/26	(1,675)	2/26	(350)	8/13	(33,100)
	(775)	3/21			(3,950)	4/24	(1,200)	3/4			(5,925)
	(203,000)	3/26					(18,500)	3/26			(219,500)
	(175,563)	4/24					(5,162)	4/24			(180,725)
							(900)	5/21			(900)
							(1,100)	9/4			(1,100)
							38,700	9/4			38,700
Balance Avail.	(103,428)		59,868		11,139		33,313		25,430		26,322
							-26,322	9/27			-26,322
							6,991				-0- ✓

26,322 Rec/NR Summ @ 9/23
Balance Available

as of 9/27
Balance is Zero

09/24/96

Community Health Representatives
Reserve Funds

	CHR Training Program	Advice Date	CHR Patient Care Component (PCC) Support	Advice Date	Traditional Health Care Practices Promotion	Advice Date	Uniband Contract	Advice Date	Technical Support (MOU w/OIRM)	Advice Date	CHR Reserve Totals
Beginning Balance	$1,105,400		$770,700		$126,500		$240,000		$52,500		$2,295,100
Less: Proposed Tribal Shares Title III	(304,115)	3/13	(212,037)	3/13	(34,806)	3/13	0		0		(550,958)
Return/Additional Title III Funding	2,167	7/10	2,778	7/10	91	7/10	0		0		5,036
Less: Tribal Shares Title I-Round I	(167,576)	6/13	(117,022)	6/13	(19,210)	6/13	0		0		(303,810)
Less: Tribal Shares Title I-Round II	(7,001)	8/5	(4,881)	8/5	(801)	8/5	0		0		(12,883)
Less: Pending Trbl Shrs Title I-Round III & IV	(42,447)	9/4	(31,645)	9/4	(5,194)	9/4	0		0		(78,286)
Revised Reserve Balance	588,428		407,893		66,580		240,000		52,500		1,353,399
	(600,000)	5/21	(275)	2/15	(10,200)	2/15	(94,121)	8/5	(25,000)	5/23	(729,596)
	(35,000)	5/23	(1,000)	3/21	(8,275)	2/26	(75,000)	8/15	(550)	8/28	(117,825)
			(68,500)	5/21	(3,100)	3/4	(8,075)	9/4	(25,000)	9/12	(104,675)
			(160,000)	5/21	(683)	4/11					(160,683)
			(77,200)	7/1	(3,612)	4/11					(80,812)
			(100,879)	8/5	(800)	4/24					(101,679)
					(27,100)	5/21					(27,100)
					(15,700)	5/21					(15,700)
					(10,000)	5/23					(10,000)
					(85)	3/21					(85)
					(5)	3/13					(5)
Balance Avail.	(46,574)		39		(11,180)		62,804		1,950		5,039
							- 5,039 9/26				-5,039
							57,765				
							5,039 REC/NR Summ @ 9/23				
							Balance Available				-0- ✓

as of 9/27
Balance is Zero

Indian Health Professions
Reserve Funds

	Extern Funds	Advice Date	Scholarship Program Carryover (6/7)	Advice Date	IHP Reserve Totals
Beginning Balance	$294,800		$200,000		$494,800
	(193,300)	6/13	(90,000)	3/21	(283,300)
	(375)	7/24	(110,000)	6/7	(110,375)
	(190,380)	8/5			(190,380)
	100,000	8/5			100,000
	(10,745)	9/17			(10,745)
Balance Available	0		0		0

0 Rec-N/R Summ @ 9/18
Balance Available

Direct Operations
Reserve Funds

	OD Managed Funds	Advice Date	Direct Operations Reserve Totals
Beginning Balance	$277,000		$277,000
	(800)	6/13	(800)
Balance Avail.	276,200		276,200
	-276,200	9/27	-276,200
	-0-		-0-

276,200 Bal Rec/NR Summ @ 9/18
Balance Available

as of 9/27
Balance is zero

09/25/96

Self-Governance
Reserve Funds

	Planning, Negotiation, & Travel	Advice Date	Shortfall	Advice Date	SG Reserve Totals
Beginning Balance	$1,600,800		$7,064,900		$8,665,700
	(800)	2/15	(11,036)	3/4	(11,836)
	(950)	2/26	(900,000)	3/13	(900,950)
	(2,709)	2/26	(51,151)	5/23	(53,860)
	(33,561)	3/4	(4,790,687)	9/21	(4,824,248)
	(15,160)	3/21	(25,868)	9/21	(41,028)
	(104,451)	4/24	(20,265)	9/21	(124,716)
	(70,000)	5/2	(55,259)	9/21	(125,259)
	(800)	5/28	(12,323)	9/21	(13,123)
	(208,799)	6/7	(9,027)	9/21	(217,826)
	(7,175)	6/7	(361,862)	9/21	(369,037)
	(3,270)	8/28	(762,522)	9/21	(765,792)
	(80,111)	9/4	(64,900)	9/25	(145,011)
	(1,743)	9/17			(1,743)
	(1,699)	9/21			(1,699)
	(1,069,572)	9/25			(1,069,572)
Balance Avail.	0		0		0

0 REC/NR Summ @ 9/25
Balance Available

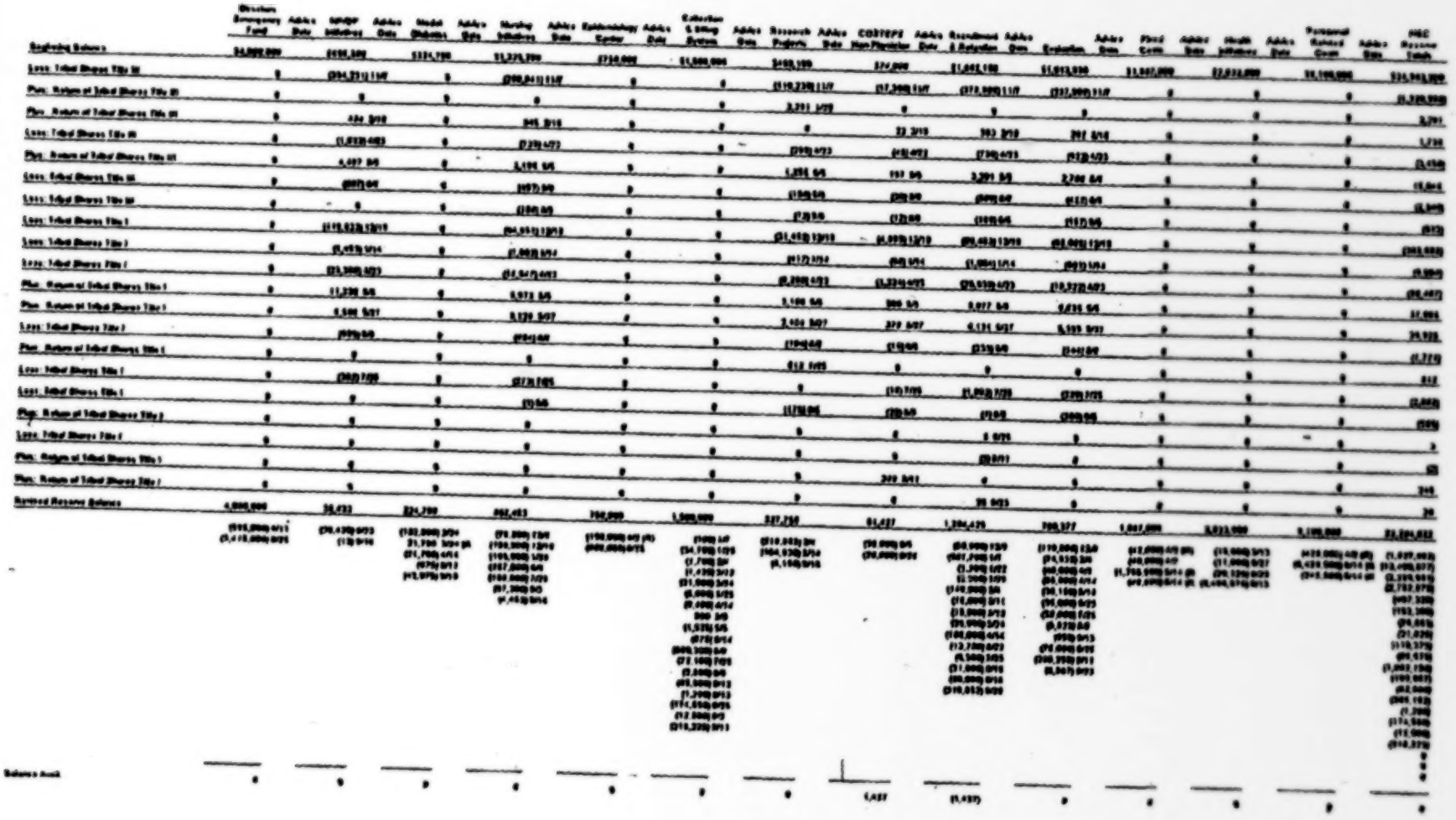
RESERVE6.WK4

Contract Health Care 6/7
Reserve Funds

	Quality Assurance	Advice Date	Deferred Services	Advice Date	CHS Reserve/ Undistributed 1/	Advice Date	Sub-Total CHS 6/7 Reserve Totals
Beginning Balance	$500,000		$2,000,000		$7,413,900		$9,913,900
Less: Proposed Tribal Shares Title III	0		0		(388,991)	3/13	(388,991)
Return/Additional Title III Funding	0		0		28,750	7/10	28,750
Less: Tribal Shares Title I-Round I	0		0		(20,161)	6/13	(20,161)
Less: Tribal Shares Title I-Round II	0		0		(22,121)	8/5	(22,121)
Less: Pending Trbl Shrs Title I-Round III & I	0		0		(44,878)	9/13	(44,878)
Revised Reserve Balance	500,000		2,000,000		6,966,499		9,466,499
	(391,500)	9/13	(1,411,560)	8/15	(1,932,000)	1/25	(3,735,060)
	(108,500)	9/13	(588,440)	8/15	(804,000)	2/9	(1,500,940)
			1,411,560	9/4	(25,000)	2/26	1,386,560
			588,440	9/4	(684,000)	4/15	(95,560)
			(2,000,000)	9/17	(2,580,000)	5/8	(4,580,000)
					(880,900)	8/15	(880,900)
					(300)	8/28	(300)
					6,645	9/23	6,645
					(28,674)	9/25	(28,674)
					(38,270)	9/25	(38,270)
Balance Avail.	0		0		0		0

0 Rec-N/R Summ @ 9/25
Balance Available

Hospitals &
Reserve Funds



438

Dental
Reserve Funds

	Training	Advice Date	RPMS	Advice Date	Consultant Travel	Advice Date	Research	Advice Date	Recruitment	Advice Date	Printing	Advice Date	Technical Assistance	Advice Date	Personnel Related Costs	Advice Date	Dental Reserve Totals
Beginning Balance	$186,000		$38,000		$158,800		$46,000		$155,000		$77,000		$192,000		$910,000		$1,731,800
Less: Tribal Shares Title III	(45,117)	11/7	(9,123)	11/7	(38,780)	11/7	(11,162)	11/7	(37,601)	11/7	(18,680)	11/7	(123,712)	11/7	0		(284,184)
Plus: Return of Tribal Shares Title III	0		25	3/18	0		0		0		0		0		0		25
Less: Tribal Shares Title III	(114)	4/23	(23)	4/23	(98)	4/23	(28)	4/23	(95)	4/23	(47)	4/23	(57)	4/23	0		(462)
Plus: Return of Tribal Shares Title III	522	5/5	106	8/5	449	8/5	130	5/5	435	8/5	218	5/5	1,839	5/5	0		3,699
Less: Tribal Shares Title III	(265)	8/5	(54)	8/5	(229)	8/5	(66)	8/5	(221)	8/5	(109)	8/5	(726)	8/5	0		(1,869)
Less: Tribal Shares Title III	0		0		0		0		0		(10,000)	8/29	0		0		(10,000)
Less: Tribal Shares Title I	(12,558)	12/19	(2,061)	12/19	(10,795)	12/19	(3,104)	12/18	(10,461)	12/19	(5,197)	12/19	(1,116)	12/19	0		(45,292)
Less: Tribal Shares Title I	0		(34)	1/14	(143)	1/14	(41)	1/14	(138)	1/14	(69)	1/14	(227)	1/14	0		(651)
Less: Tribal Shares Title I	(3,398)	4/23	(1,092)	4/23	(2,883)	4/23	(877)	4/23	(2,889)	4/23	(1,431)	4/23	(24,453)	4/23	0		(37,062)
Plus: Return of Tribal Shares Title I	1,258	5/5	258	5/5	1,086	5/5	311	5/5	1,047	5/5	520	5/5	0		0		4,470
Less: Tribal Shares Title I	0		0		0		0		0		0		(1,830)	5/5	0		(1,830)
Plus: Return of Tribal Shares Title I	1,344	5/27	254	5/27	1,070	5/27	308	5/27	1,037	5/27	516	5/27	1,705	5/27	0		6,134
Less: Tribal Shares Title I	(50)	6/9	(10)	6/9	(108)	6/9	(19)	6/9	(42)	6/9	(21)	6/9	(186)	6/9	0		(444)
Plus: Return of Tribal Shares Title I	361	7/25	74	7/25	0		9	7/25	0		0		0		0		444
Less: Tribal Shares Title I	0		0		(38)	7/25	0		(35)	7/25	(18)	7/25	(101)	7/25	0		(190)
Plus: Return of Tribal Shares Title I	0		126	9/11	0		0		0		0		0		0		126
Revised Reserve Balance	127,918		26,447		109,341		31,481		106,046		42,980		11,124		910,000		1,365,014
	(69,600)	12/18	(20,998)	12/18	(87,949)	12/18	(25,799)	12/18	(4,701)	12/18	(42,351)	12/18	82,000	1/18(R)	(910,000)	8/14 (R	(1,077,298)
	(14,000)	1/22	(5,000)	6/23	(17,239)	7/25	(6,162)	8/5	(7,648)	12/18	(329)	8/3	(11,051)	12/18			(61,421)
	(30,900)	6/25	(323)	8/3	(2,800)	8/5			(12,000)	12/18			(82,770)	7/28			(138,893)
	(8,918)	8/3	(126)	9/11	(1,382)	8/3			(4,002)	12/18							(12,405)
									(10,000)	1/22							(10,000)
									(7,000)	4/1							(7,000)
									(50,000)	8/5							(50,000)
									(997)	8/3							(997)
Balance Avail	0		0		0		0		997		0		(997)		0		0

0 Rec/RR Bumm @ 9/12
Balance Available

09/13/97

Mental Health
Reserve Funds

	C.M.I. Grants	Advice Date	National Conference	Advice Date	Personnel Related Costs	Advice Date	Mental Health Reserve Totals
Beginning Balance	$600,000		$102,500		$390,000		$1,092,500
Less: Tribal Shares Title III	(56,475)	11/7	(28,334)	11/7	0		(84,809)
Plus: Return of Tribal Shares Title III	100	2/19	0		0		100
Plus: Return of Tribal Shares Title III	78	4/23	0		0		78
Less: Tribal Shares Title III	0		(63)	4/23	0		(63)
Plus: Return of Tribal Shares Title III	881	5/5	95	5/5	0		976
Less: Tribal Shares Title III	0		(29)	5/5	0		(29)
Less: Tribal Shares Title III	(5)	8/5	(2)	8/5	0		(7)
Less: Tribal Shares Title I	(14,284)	12/19	(7,322)	12/19	0		(21,606)
Plus: Return of Tribal Shares Title I	6,388	4/23	0		0		6,388
Less: Tribal Shares Title I	0		(2,084)	4/23	0		(2,084)
Plus: Return of Tribal Shares Title I	1,830	5/5	692	5/5	0		2,522
Plus: Return of Tribal Shares Title I	0		254	5/27	0		254
Less: Tribal Shares Title I	(1)		(2)	8/8	0		(3)
Less: Tribal Shares Title I	(33)	7/25	(23)	7/25	0		(56)
Revised Reserve Balance	538,457		65,702		390,000		994,159
	11,647 →		(52,810)	12/16	(390,000)	5/14 (P)	(431,863)
	54,848	5/5	(11,047)				43,599
	(600,000)	5/14	(787)	5/14			(600,787)
	(1,713)	5/14	(958)	8/11			(2,671)
	(2,437)	8/11					(2,437)
	$0		$0		$0		$0

D Rec/RR Summ @ 8/12
Balance Available

Alcohol/Substance Abuse
Reserve Funds

	Tagging	Admin Data	PAS/CDC/MDA	Admin Data	PAS Washington University	Admin Data	Information Systems	Admin Data	MDH/MDH & DHS/MPA	Admin Data	Research/Evaluation Project	Admin Data	RTC Adolescent Placement	Admin Data	Outpatient Treatment Initiative	Admin Data	Tele-Medicine Expansion	Admin Data	Wellpoint SU Support Services	Admin Data	Other Tribes	Admin Data	Personnel Related Costs	Admin Data	Alcohol Sub. Abuse Reserve Totals
Beginning Balance	$155,111		$207,071		$131,139		$215,000		$100,000		$200,000		$45,000		$100,000		$100,000		$100,000		$100,000		$100,000		$1,324,000
Less: Tribal Shares Title III	($1,719)	1/7	($5,000)	1/7	0		($6,319)	1/7	($3,304)	1/7	($60,170)	1/7	($7,110)	1/7	($3,722)	1/7	0		0		0		0		($28,057)
Less: Tribal Shares Title IV	($78)	4/7	($56)	4/7	0		($72)	4/7	($0)	4/7	($1,000)	4/7	($7)	4/7	($2)	4/7	0		0		0		0		($1,013)
Plus: Return of Tribal Shares Title III	$50	$/5	$10	$/5	0		$2	$/5	$0	$/5	$ 1,833	$/5	$0	$/5	$20	$/5	0		0		0		0		$ 2,220
Less: Tribal Shares Title IV	($ 0)	$/5	($0)	$/5	0		($0)	$/5	($0)	$/5	($0)	$/5	($0)	$/5	($0)	$/5	0		0		0		0		($1)
Less: Tribal Shares Title I	($6,270)	12/10	($7,000)	12/10	0		($3,001)	12/10	($1,000)	12/10	($101,100)	12/10	($12,300)	12/10	($7,400)	12/10	0		0		0		0		($135,304)
Less: Tribal Shares Title I	($50)	3/14	($50)	3/14	0		($150)	3/14	($0)	3/14	($1,070)	3/14	($20)	3/14	($20)	3/14	0		0		0		0		($1,420)
Less: Tribal Shares Title I	($1,170)	3/13	($3,000)	3/13	0		($1,310)	3/13	($1,010)	3/13	($24,110)	3/13	($3,000)	3/13	($1,120)	3/13	0		0		0		0		($33,010)
Plus: Return of Tribal Shares Title I	0		0		0		0		0		0		$00	4/5	0		0		0		0		0		$00
Less: Tribal Shares Title I	($ 920)	4/5	($ 211)	4/5	0		($ 210)	4/5	($ 210)	4/5	($0,007)	4/5	0		($ 020)	4/5	0		0		0		0		($1,070)
Plus: Return of Tribal Shares Title I	$ 00	$/5	$ 07	$/5	0		$70	$/5	$22	$/5	$ 00	$/5	$00	$/5	$ 01	$/5	0		0		0		0		$ 101
Less: Tribal Shares Title I	($0)	0/0	($00)	0/0	0		($0)	0/0	($0)	0/0	($0)	0/0	($0)	0/0	($0)	0/0	0		0		0		0		($ 1)
Plus: Return of Tribal Shares Title I	0		0		0		$2	7/5	0		0		0		0		0		0		0		0		$2
Less: Tribal Shares Title I	($0)	7/5	($0)	7/5	0		0		($4)	7/5	($0)	7/5	($0)	7/5	($0)	7/5	0		0		0		0		($0)
Plus: Return of Tribal Shares Title I	$0	$/5	$0	$/5	0		$0	$/5	$0	$/5	$ 0	$/5	$0	$/5	$0	$/5	0		0		0		0		$ 0
Less: Tribal Shares Title I	($0)	0/0	0		0		0		0		0		0		0		0		0		0		0		($0)
Plus: Return of Tribal Shares Title I	$0	$/5	$0	$/5	0		$0	$/5	$0	$/5	$0	$/5	$0	$/5	$0	$/5	0		0		0		0		$ 0
Interest Reserve Balance	$20,240		$71,070		$31,130		$47,000		$0,200		($00,000)		$7,000		$0,000		$00,000		$00,000		$00,000		$00,000		$0,000
	($10,000) 3/1		($0,000) 3/1		($31,130) 3/1		($0,000) 3/1						($ 370) 0/10								($4,500) 3/1		($30,000) 3/1		($63,870)
	($00) 3/7				($1,000) 0/1		($4,000) 0/0																		($7,000)
	($0,000) 0/1																								($0,000)
	($0,000) 0/1																								($0,000)
	($0,070) 0/20																								($0,070)
	124,187		134,070		(1,000)		12,000		110,200		(700,000)		41,000		10,010		100,000		100,000		83,040		0		0

Public Health Nursing
Reserve Funds

	Preventive Health Initiative	Advice Date	Personnel Related Costs	Advice Date	FY 1997 Preventive Health Initiative	Advice Date	Public Health Nursing Reserve Totals
Beginning Balance	$670,000		$390,000		$1,000,000		$2,260,000
Less: Tribal Shares Title III	(245,892)	11/7	0		0		(245,892)
Plus: Return of Tribal Shares Title III	540	2/18	0		0		540
Less: Tribal Shares Title III	(535)	4/23	0		0		(535)
Plus: Return of Tribal Shares Title III	803	5/5	0		0		803
Less: Tribal Shares Title III	(249)	5/5	0		0		(249)
Less: Tribal Shares Title III	(19)	8/5	0		0		(19)
Less: Tribal Shares Title I	(73,251)	12/19	0		0		(73,251)
Less: Tribal Shares Title I	(774)	1/14	0		0		(774)
Less: Tribal Shares Title I	(135,840)	3/13	0		0		(135,840)
Less: Tribal Shares Title I	(18,202)	4/23	0		0		(18,202)
Plus: Return of Tribal Shares Title I	5,878	5/5	0		0		5,878
Plus: Return of Tribal Shares Title I	2,389	5/27	0		0		2,389
Less: Tribal Shares Title I	(423)	8/9	0		0		(423)
Plus: Return of Tribal Shares Title I	98,725	7/10	0		0		98,725
Less: Tribal Shares Title I	(199)	7/25	0		0		(199)
Revised Reserve Balance	505,149		390,000		1,000,000		1,895,149
	(344,000)	2/4	(390,000)	5/14 (R)	(990,000)	12/9(R)	(1,724,000)
	(154,000)	7/10			(10,000)	9/3	(164,000)
	(7,000)	9/3					(7,000)
	(149)	9/16					(149)
							0
Balance Avail.	0		0		0		0

0 Rec/NR Summ @ 9/17
Balance Available

Health Education
Reserve Funds

	HIV Prevention Initiative	Advice Date	Physical Fitness Initiative	Advice Date	Patient Education Demonstration Project	Advice Date	Networking & Advocacy	Advice Date	Strategic Planning Initiative	Advice Date	Personnel Related Costs	Advice Date	Health Education Reserve Totals
Beginning Balance	$535,000		$325,000		$90,000		$50,000		$81,700		$65,000		$1,146,700
Less: Tribal Shares Title III	(148,605)	11/7	(90,274)	11/7	(25,001)	11/7	(13,889)	11/7	(22,698)	11/7	0		(300,467)
Plus: Return of Tribal Shares Title III	3	2/18	0		0		0		0		0		3
Less: Tribal Shares Title III	(329)	4/23	(199)	4/23	(55)	4/23	(31)	4/23	(50)	4/23	0		(664)
Plus: Return of Tribal Shares Title III	1,500	5/5	911	5/5	252	5/5	140	5/5	229	5/5	0		3,032
Less: Tribal Shares Title III	(1,994)	8/5	(1,211)	8/5	(335)	8/5	(186)	8/5	(305)	8/5	0		(4,031)
Less: Tribal Shares Title I	(106,597)	12/19	(64,747)	12/19	(17,832)	12/19	(9,963)	12/19	(16,276)	12/19	0		(215,515)
Less: Tribal Shares Title I	(476)	1/14	(289)	1/14	(80)	1/14	(44)	1/14	(73)	1/14	0		(962)
Less: Tribal Shares Title I	(21,872)	3/13	(13,287)	3/13	(3,679)	3/13	(2,045)	3/13	(3,340)	3/13	0		(44,223)
Less: Tribal Shares Title I	(8,710)	4/23	(5,304)	4/23	(1,468)	4/23	(817)	4/23	(1,335)	4/23	0		(17,634)
Plus: Return of Tribal Shares Title I	3,613	5/5	2,195	5/5	607	5/5	338	5/5	552	5/5	0		7,305
Plus: Return of Tribal Shares Title I	4,658	5/27	2,831	5/27	784	5/27	435	5/27	712	5/27	0		9,421
Less: Tribal Shares Title I	(116)	6/9	(95)	6/9	(135)	6/9	(13)	6/9	(22)	6/9	0		(381)
Less: Tribal Shares Title I	(121)	7/25	(74)	7/25	(20)	7/25	(11)	7/25	(19)	7/25	0		(245)
Revised Reserve Balance	256,955		155,457		42,938		23,914		39,075		65,000		582,339
	(125,000)	5/14	(35,979)	4/23	(25,500)	5/14	(500)	1/14	(20,000)	2/4	(65,000)	5/14 (R)	(271,975)
	(35,000)	8/5	(50,000)	5/27	(200)	6/9	(50)	1/22	(2,150)	2/18			(87,400)
	(45,000)	8/5	(48,425)	6/9	(7,800)	8/5	(6,000)	2/11	(1,400)	3/13			(109,425)
	(44,000)	8/5	(20,057)	9/3	(8,400)	9/3	(2,000)	2/24	(75)	3/24			(74,532)
	(6,955)	9/26			(430)	9/16	(11,500)	8/5 (R)	(10,500)	6/5			(29,385)
					(500)	9/23	(350)	8/25	(4,943)	9/3			(5,793)
					(308)	9/26	(600)	9/26	(7)	9/26			(915)
							(2,914)	9/26					(2,914)
													0
Balance Avail	0		0		0		0		0		0		0

Community Health Representatives
Reserve Funds

	CHR Training Program	Advice Date	CHR Patient Care Component (PCC) Support	Advice Date	Traditional Health Care Practices Promotion	Advice Date	Uniband Contract	Advice Date	Technical Support (MOU w/OSRM)	Advice Date	CHR Reserve Totals
Beginning Balance	$1,105,400		$770,700		$121,900		$240,000		$52,500		$2,290,500
Less: Tribal Shares Title III	(311,823)	11/7	(220,813)	11/7	(36,279)	11/7	(52,383)	11/7	(11,455)	11/7	(632,633)
Plus: Return of Tribal Shares Title III	1	2/18	317	2/18	0		0		0		318
Less: Tribal Shares Title III	(680)	4/23	(474)	4/23	(78)	4/23	(147)	4/23	(32)	4/23	(1,411)
Plus: Return of Tribal Shares Title III	1,018	5/5	711	5/5	117	5/5	222	5/5	49	5/5	2,118
Less: Tribal Shares Title III	(25)	8/5	(17)	8/5	(2)	8/5	0		0		(44)
Plus: Return of Tribal Shares Title III	0		0		0		889	8/5	194	8/5	1,083
Less: Tribal Shares Title I	(217,026)	12/19	(153,548)	12/19	(25,705)	12/19	0		0		(395,779)
Less: Tribal Shares Title I	(983)	1/14	(686)	1/14	(113)	1/14	(214)	1/14	(47)	1/14	(2,043)
Less: Tribal Shares Title I	(45,191)	3/13	(31,509)	3/13	(5,171)	3/13	(30,260)	3/13	(6,620)	3/13	(118,751)
Less: Tribal Shares Title I	(25,883)	4/23	(17,898)	4/23	(2,937)	4/23	(19,943)	4/23	(4,362)	4/23	(70,823)
Plus: Return of Tribal Shares Title I	7,486	5/5	5,205	5/5	854	5/5	0		0		13,526
Less: Tribal Shares Title I	0		0		0		(1,148)	5/5	(251)	5/5	(1,399)
Less: Tribal Shares Title I	(1,888)	6/9	(369)	6/9	0		(85)	6/9	(14)	6/9	(2,334)
Plus: Return of Tribal Shares Title I	0		1,499	7/25	247	7/25	0		0		1,746
Less: Tribal Shares Title I	(252)	7/25	0		0		(55)	7/25	(12)	7/25	(319)
Less: Tribal Shares Title I	(371)	8/5	(398)	8/5	(85)	8/5	(124)	8/5	(28)	8/5	(1,166)
Less: Tribal Shares Title I	(1,160)	8/25	0		0		0		0		(1,160)
Revised Reserve Balance	508,809		352,826		53,268		136,792		29,922		1,081,406
	(383,900)	2/24	(2,200)	2/4	(5,000)	1/29	(38,700)	8/25	(75,000)	2/24	(482,500)
	(201,100)	2/24	(32,108)	2/24	(4,325)	1/22	(900)	8/18			(238,425)
	(2,300)	2/24	(3,000)	3/3	(17,200)	2/24					(22,500)
	(210,000)	8/23	(1,178)	3/24	(32,200)	2/24					(243,375)
			(1,500)	5/27	(1,200)	2/24					(2,700)
			(25,000)	6/23	(25,000)	2/24					(50,000)
			(20,000)	8/5	(1,500)	6/23					(21,500)
			(2,450)	8/25							(2,450)
			(17,958)	8/23							(17,958)
											0
											0
Balance Avail.	(288,194)		247,237		(33,157)		99,192		(45,078)		0

0 Rec'HR Swsm @ 9/24
Balance Available

Urban Health Projects
Reserve Funds

	Urban Health Initiative	Advice Date	Urban Reserve Totals
Beginning Balance	$1,000,000		$1,000,000
	(633,100)	11/25(R)	(633,100)
	(366,900)	4/14(R)	(366,900)
Balance Available	0		0

Direct Operations
Reserve Funds

	OD Managed Funds	Advice Date	Personnel Related Costs	Advice Date	Direct Operations Reserve Totals
Beginning Balance	$277,000		$1,000,000		$1,277,000
	(277,000)	9/11	(1,000,000)	5/14 (R)	(1,277,000)
Balance Avail.	0		0		0

0 Rec/NR Summ @ 9/12
Balance Available

10/07/97

Self-Governance
Reserve Funds

	Planning, Negotiation, & Travel	Advice Date	Shortfall	Advice Date	SG Reserve Totals
Beginning Balance	$1,600,800		$7,064,900		$8,665,700
	(2,660)	1/7	(142,842)	3/13	(145,502)
	(503)	1/14	(32,672)	4/23	(33,175)
	(100,000)	2/18	(424,265)	4/23	(524,265)
	(16,530)	2/18	(3,276,176)	5/5	(3,292,706)
	(4,276)	3/24	(2,000,000)	7/25	(2,004,276)
	(168,000)	4/14	(21,259)	8/5	(189,259)
	16,530	5/5	37,000	8/13	53,530
	(50,000)	5/14	(223,146)	9/3	(273,146)
	(100,000)	8/23	(100,000)	9/11	(200,000)
	(407)	6/23	(100,000)	9/11	(100,407)
	(38,453)	7/7	165,000	9/11	126,547
	(15,100)	8/5	(137,400)	9/16	(152,500)
	(328,282)	8/25	(37,000)	9/26	(365,282)
	(172,556)	9/3	(353,869)	9/29	(526,425)
	(17,129)	9/16	(418,271)	9/30	(435,400)
	(700)	9/18			(700)
	(90,000)	9/16			(90,000)
	(232,516)	9/23			(232,516)
	(6,444)	9/26			(6,444)
	(273,774)	9/30			(273,774)
Balance Avail.	0		0		0

Contract Health Care And Indian Health Professions 7/8
Reserve Funds

	Quality Assurance	Advice Date	Deferred Services	Advice Date	CHS Reserve/ Undistributed 1/	Advice Date	Fixed Costs	Advice Date	Personnel Related Costs	Advice Date	New and Expanded Tribes	Advice Date	INDIAN HEALTH PROFESSIONS: Extern Funds	Advice Date	Scholarship Conferences	Advice Date	Sub-Total CHS 7/8 Reserve Totals
Beginning Balance	$500,000		$2,000,000		$1,413,900		$2,535,000		$26,000		$14,300		$1,294,800		$200,000		$7,984,000
Less: Tribal Shares Title III	(66,880)	1/7	0		(854,747)	11/7	0		0		0		0		0		(921,707)
Plus: Return of Tribal Shares Title III	0		0		4,742	3/18	0		0		0		0		0		4,742
Less: Tribal Shares Title III	(181,140)	5/27	0		(900)	4/22	0		0		0		0		0		(182,000)
Plus: Return of Tribal Shares Title III	0		0		3,992	5/6	0		0		0		0		0		3,992
Less: Tribal Shares Title III	0		0		(400,825)	5/13	0		0		0		0		0		(400,825)
Plus: Return of Tribal Shares Title III	0		0		9,264	6/10	0		0		0		0		0		9,264
Less: Tribal Shares Title III	0		0		(1,981)	6/6	0		0		0		0		0		(1,981)
Plus: Return of Tribal Shares Title III	0		0		137,400	9/16	0		0		0		0		0		137,400
Plus: Return of Tribal Shares Title III	0		0		(845)	9/16	0		0		0		0		0		(845)
Less: Tribal Shares Title I	(12,510)	12/18	0		(87,160)	12/20	0		0		0		0		0		(99,670)
Less: Tribal Shares Title I	(37,500)	5/27	0		(1,258)	1/13	0		0		0		0		0		(38,758)
Less: Tribal Shares Title I	0		0		(27,973)	4/22	0		0		0		0		0		(27,973)
Plus: Return of Tribal Shares Title I	0		0		9,549	5/6	0		0		0		0		0		9,549
Plus: Return of Tribal Shares Title I	0		0		4,371	5/27	0		0		0		0		0		4,371
Less: Tribal Shares Title I	0		0		(317)	6/10	0		0		0		0		0		(317)
Less: Tribal Shares Title I	0		0		(329)	7/24	0		0		0		0		0		(329)
Less: Tribal Shares Title I	0		0		(4,098)	9/10	0		0		0		0		0		(4,098)
Revised Reserve Balance	221,980		2,000,000		199,835		2,535,000		26,000		14,300		1,294,800		200,000		6,496,825
	(79,500)	5/27	(2,000,000)	6/6	(36,000)	1/29	(2,535,000)	5/13 (R	(26,000)	5/13 (R)	(14,300)	3/24 (R)	(450)	12/18	(200,000)		(4,891,250)
	(142,980)	6/6			(180,835)	9/27							(11,300)	3/3			(314,420)
													(15,000)	4/2			(15,000)
													(552,625)	6/10			(552,625)
													(450)	7/25			(450)
													(10,000)	8/5			(10,000)
													(264,610)	9/10			(264,610)
													(27,350)	9/16			(27,350)
													(14,500)	9/22			(14,500)
													(376,815)	9/27			(376,815)
Balance Available	0		0		0		0		0		0		0		0		0

I[illegible]AN HEALTH SERVICE
CONTRACT SUPPORT COST

FY 1996 AND FY 1997 AREA ALLOCATIONS
($'S IN 000'S)

11-Feb-98

AREA OFFICE	FY 1995 RECURRING BASE (1)	F Y 1996 CONF INCRS INDIAN SELF-DETERM. FY 95 - X0390 (2)	F Y 1996 CONF INCRS ANNUALIZ. NEW FACILITY KOTZEBUE (3)	TOTAL FY 1996 FINAL YR END AREA ALLOCATIONS (4)	F Y 1997 CONF INCRS INDIAN SELF-DETERM. FY 96 - X0390 (5)	F Y 1997 CONF INCRS ANNUALIZ. NEW FACILITY KOTZEBUE (6)	F Y 1997 CONF INCRS OTHER CSC (7)	TOTAL FY 1997 FINAL YR END AREA ALLOCATIONS (8)
ABERDEEN	$6,910.5	$315.0	$0.0	$7,225.5	$0.0	$0.0	$0.0	$7,225.5
ALASKA	38,968.7	1,190.8	80.0	40,239.5	285.0	120.0	0.0	40,644.5
ALBUQUERQUE	3,899.4	226.7	0.0	4,126.1	72.8	0.0	0.0	4,198.9
BEMIDJI	8,558.1	96.3	0.0	8,654.4	0.0	0.0	0.0	8,654.4
BILLINGS	3,904.3	1,641.5	0.0	5,545.8	0.0	0.0	0.0	5,545.8
CALIFORNIA	19,603.2	0.0	0.0	19,603.3	0.0	0.0	0.0	19,603.3
NASHVILLE	11,445.5	70.0	0.0	11,515.5	400.0	0.0	0.0	11,915.5
NAVAJO	3,847.5	0.0	0.0	3,847.5	0.0	0.0	0.0	3,847.5
OKLAHOMA	13,988.5	85.1	0.0	14,073.6	4,438.4	0.0	0.0	18,512.0
PHOENIX	4,953.0	562.6	0.0	5,515.6	0.0	0.0	60.0	5,575.6
PORTLAND	20,881.4	3,312.0	0.0	24,193.4	2,292.8	0.0	0.0	26,486.2
TUCSON	999.8	0.0	0.0	999.8	11.0	0.0	0.0	1,010.8
HDQTRS-WEST	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
HDQTRS-EAST	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
RESERVES	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
CSC TOTAL SVCS	$137,960.0	$7,500.0	$80.0	$145,540.0	$7,500.0	$120.0	$60.0	$153,220.0
X 0390 - ISD FUNDS	7,500.0	0.0	0.0	7,500.0	0.0	0.0	0.0	7,500.0
TOTAL CSC APPROPR	$145,460.0	$7,500.0	$80.0	$153,040.0	$7,500.0	$120.0	$60.0	$160,720.0

CSCADJ98 WK4

Attachment #2, AFA Detail Report attached to Tab 23: Fiscal Year 1996 Annual Funding Agreement between the United States of America and Cherokee Nation, dated June 30, 1995
[See JA Vol. I, PART 2 for Tab 23]

Attachment #2

AFA
Detail Report

This spreadsheet details a Tribe's potential TSA share of all HQ accounts to which TSA is applied. This report is printed separately for each AFA. It can be used to assist tribes in determining which HQ functions & $ the tribe will assume in a compact.

Cherokee Nation

	FA Shares by HQ Acct.	Shares from Program Formula	TSA Pool Funds $ Available in each HQ Account	TSA Pool Funds Share IF 100% Compacted	Adjustments to C if an Oklahoma Inter-Tribal Agreements	Adjustments to C if an Enter % IF NOT 100%*	Shares Eligible for Compact	Enter Negotiated Amount of F	Enter Retained Amount of F
	Enter AFA Name "exactly" below								
	CHEROKEE NATION								
	100% TSA Share of HQ Pool								
	$4,752,391	A	B	C	D	E	F	G	H
0	BUDGET ACTIVITY/SERVICE								
0	0								
1	HOSPITALS & CLINICS:								
2	A. Emergency Fund		$0	$0	$0	100.0%	$0		
3	0		$0	$0	$0	100.0%	$0		
4	B. IHS-Wide Program Requirement		$0	$0	$0	100.0%	$0		
5	OFFICE OF ADMIN. & MGMT.		$0	$0	$0	100.0%	$0		
6	Assessments/Svc&Supply (FY 95 Est.)		$0	$0	$0	100.0%	$0		
7	Workmans/Unemploy. Comp. (FY 95 Est.)		$0	$0	$0	100.0%	$0		
8	Inter-Agency Agreements		$1,355,600	$102,087	$0	100.0%	$102,087		
9	Special Pay		$0	$0	$0	100.0%	$0		
10	OFFICE OF THE DIRECTOR		$0	$0	$0	100.0%	$0		
11	Management Initiatives		$0	$0	$0	100.0%	$0		
12	OFFICE OF HEALTH PROGRAMS		$0	$0	$0	100.0%	$0		
13	ACOG Contract		$91,913	$6,922	$0	100.0%	$6,922		
14	HPDP Initiatives		$1,677,759	$126,348	$0	100.0%	$126,348		
15	Indian Children's Program		$0	$0	$0	100.0%	$0		
16	Model Diabetes		$33,306	$2,508	$0	100.0%	$2,508		
17	NECI		$1,015,649	$76,486	$0	100.0%	$76,486		
	Nurse Initiatives		$1,195,200	$90,008	$0	100.0%	$90,008		
	Nursing Costeps		$467,621	$35,215	$0	100.0%	$35,215		
	Senior Clinicians		$255,602	$19,249	$0	100.0%	$19,249		
	Woman & Elderly Health		$500,000	$37,654	$0	100.0%	$37,654		
22	Epidemiology Center		$0	$0	$0	100.0%	$0		
23	Emergency Medical Svcs-PHOENIX		$232,889	$17,536	$0	100.0%	$17,536		
24	OFFICE OF HLTH PROGR. RES. & DVLPMNT		$0	$0	$0	100.0%	$0		
25	Research Projects		$469,100	$35,327	$0	100.0%	$35,327		
26	OFFICE OF HUMAN RESOURCES		$0	$0	$0	100.0%	$0		
27	AAIP Contract		$24,981	$1,881	$0	100.0%	$1,881		
28	Clinical Support Center-PHOENIX		$1,434,849	$108,055	$0	100.0%	$108,055		
29	Costeps-Non Physicians		$74,000	$5,573	$0	100.0%	$5,573		
30	Physician Residency		$254,793	$19,188	$0	100.0%	$19,188		
31	Recruitment/Retention		$1,196,045	$90,071	$0	100.0%	$90,071		
32	USUHS, etc.		$2,797,736	$210,691	$0	100.0%	$210,691		
33	OFFICE OF INFO. RESOURCES MGMT.		$0	$0	$0	100.0%	$0		
34	IRM Support Fund		$9,055,300	$681,932	$0	100.0%	$681,932		
35	Inform. Systems Initiative		$0	$0	$0	100.0%	$0		
36	OFFICE OF PLANNING, EVAL & LEGISLATION		$0	$0	$0	100.0%	$0		
37	Evaluation		$1,012,500	$76,249	$0	100.0%	$76,249		
38	OFFICE OF TRIBAL ACTIVITIES		$0	$0	$0	100.0%	$0		
39	National Indian Health Board		$428,524	$32,271	$0	100.0%	$32,271		
40	SUB-TOTAL-HOSPITALS & CLINICS		$23,573,367	$1,775,252	$0	100.0%	$1,775,252		
41	0		$0	$0	$0	100.0%	$0		
42	HEADQUARTERS WEST		$0	$0	$0	100.0%	$0		
43	HQW Administration		$604,556	$45,528	$0	100.0%	$45,528		
	OFFICE OF ADMIN. & MANAGEMENT		$0	$0	$0	100.0%	$0		
	Records Management		$0	$0	$0	100.0%	$0		
	Supply Managment		$0	$0	$0	100.0%	$0		

	FA Shares by HQ Acct.	Shares from Program Formula	TSA Pool Funds $ Available in each HQ Account	TSA Pool Funds Share IF 100% Compacted	Adjustments to C if an Oklahoma Inter-Tribal Agreements	Adjustments to C if an Enter % IF NOT 100%*	Shares Eligible for Compact	Enter Negotiated Amount of F	Enter Retained Amount of F
	Enter AFA Name "exactly" below								
	CHEROKEE NATION								
	100% TSA Share of HQ Pool								
	$4,752,391	A	B	C	D	E	F	G	H
47	Property Management		$0	$0	$0	100.0%	$0		
48	OFFICE OF HEALTH PROGRAMS		$0	$0	$0	100.0%	$0		
49	Nutrition Training Center		$342,414	$25,786	$0	100.0%	$25,786		
50	Diabetes Program		$939,697	$70,766	$0	100.0%	$70,766		
51	Cancer Prevention		$635,109	$47,828	$0	100.0%	$47,828		
52	Health Records		$97,303	$7,328	$0	100.0%	$7,328		
53	AIDS Program		$637,084	$47,977	$0	100.0%	$47,977		
54	Handicapped Children		$333,612	$25,123	$0	100.0%	$25,123		
55	Tradtional Medicine		$97,925	$7,374	$0	100.0%	$7,374		
56	OFFICE OF HUMAN RESOURCES		$128,408	$9,670	$0	100.0%	$9,670		
57	OFFICE OF INFORM. RES. MANAGEMENT		$5,565,496	$419,124	$0	100.0%	$419,124		
58	SUB-TOTAL-HOSPITALS & CLINICS HQW		$9,381,602	$706,505	$0	100.0%	$706,505		
59	OFFICE OF HLTH PROGR. RES. & DVLPMT		$1,862,246	$140,241	$0	100.0%	$140,241		
60	GRAND TOTAL - HOSPITALS & CLINICS		$34,817,214	$2,621,998	$0	100.0%	$2,621,998		
61	1/ Earmarked to support model programs in specific area to be determined by OHP. Supported by Congressional language.								
62	2/ If funds are received in FY 96 budget, they will be used to support specific Epi Centers. TBD later. Supported by Congressional language.								
63	3/ Reflects Employee Accident Compensation & Unemployment Compensation to be funded by Prior Yr Funds, if available. If no Prior Yr Funds Available, then FY 1996 Fu								
64	4/ Additional funds requested in FY 96 President's Budget.								
65	5/ Amount includes funds for 2nd year of 3-year contracts for ST physician services with AMA ($492,769) & ACOG ($108,288).								
	•								
	0								
	DENTAL PROGRAM:		$0	$0	$0	100.0%	$0		
69	Training		$429,988	$32,381	$0	100.0%	$32,381		
70	RPMS 1/	$1,522	$0	$0	$0	100.0%	$0		
71	Consultant Travel		$305,720	$23,023	$0	100.0%	$23,023		
72	Research		$28,195	$2,123	$0	100.0%	$2,123		
73	Special Pay 2/		$0	$0	$0	100.0%	$0		
74	Technical Assistance		$186,190	$14,022	$0	100.0%	$14,022		
75	TOTAL - DENTAL PROGRAM		$950,093	$71,549	$0	100.0%	$71,549		
76	1/ Specific project to develop a client server for Dental database.								
77	2/ Based on eligibility.								
78	•								
79	0								
80	MENTAL HEALTH PROGRAM:								
81	Technical Assistance		$1,329,440	$100,117	$0	100.0%	$100,117		
82	National Conference		$94,764	$7,136	$0	100.0%	$7,136		
83	CMI Grants 1/		$18,382	$1,384	$0	100.0%	$1,384		
84	Child Abuse Grant 2/ 3/		$9,191	$692	$0	100.0%	$692		
85	na		$0	$0	$0	100.0%	$0		
86	Special Pay 4/		$0	$0	$0	100.0%	$0		
87	TOTAL - MENTAL HEALTH		$1,451,777	$109,330	$0	100.0%	$109,330		
88	0								
92	1/ Competitive 5 year grant (1994-1999) Tonsho O'oham & White River.								
93	2/ Includes an add $250,000 requested in FY 96 budget. If funds received, they will not be available for tribal shares but to tribes under Prog Form.								
94	3/ Competitive 5 year grant (1995-2000) Salt River.								
	4/ Based on eligibility.								
	•								
	ALCOHOL/SUBSTANCE ABUSE:		$0	$0	$0	100.0%	$0		

FY 1996 HQ General Funds Pool — AFA Detail by Account — 05/12/95 03:16 PM

	"A Shares by HQ Acct. Enter AFA Name "exactly" below: CHEROKEE NATION — 100% TSA Share of HQ Pool: $4,752,391	Shares from Program Formula	TSA Pool Funds: $ Available in each HQ Account	TSA Pool Funds: Share IF 100% Compacted	Adjustments to C if an: Oklahoma Inter-Tribal Agreements	Adjustments to C if an: Enter % IF NOT 100%*	Shares Eligible for Compact	Enter Negotiated Amount of F	Enter Retained Amount of F
		A	B	C	D	E	F	G	H
98	Technical Assistance		$1,500,000	$112,961	$0	100.0%	$112,961		
99	FAS CDC MOA		$357,470	$26,920	$0	100.0%	$26,920		
100	Department of Labor Grant		$21,028	$1,584	$0	100.0%	$1,584		
101	Primary Care Providers Training		$189,249	$14,252	$0	100.0%	$14,252		
102	FAS-Washington Univ. 1/		$0	$0	$0	100.0%	$0		
103	Gallup 2/		$0	$0	$0	100.0%	$0		
104	Child Abuse Initiative		$1,862,000	$140,223	$0	100.0%	$140,223		
105	Tobacco Cessation 4/		$0	$0	$0	100.0%	$0		
106	None for the Road		$157,708	$11,877	$0	100.0%	$11,877		
107	CDMIS Support Funds		$136,680	$10,293	$0	100.0%	$10,293		
108	BIA/IHS Conference		$48,002	$3,615	$0	100.0%	$3,615		
109	BIA Newsletter		$4,206	$317	$0	100.0%	$317		
110	Tucson Methadone Program 4/		$0	$0	$0	100.0%	$0		
111	Winnebago Diabetes Project 4/		$0	$0	$0	100.0%	$0		
112	Tulsa IHCRC Substance Abuse 4/		$0	$0	$0	100.0%	$0		
113	Counselor Certification Initiative		$63,083	$4,751	$0	100.0%	$4,751		
114	Rapid City Demo Project 4/		$0	$0	$0	100.0%	$0		
115	Clinical Supervision Training		$8,411	$633	$0	100.0%	$633		
116	Suicide Protocol Standards		$15,771	$1,188	$0	100.0%	$1,188		
	DHHS Special Initiative-Albuq. 3/		$0	$0	$0	100.0%	$0		
	DHHS Special Initiative-Abrdn 3/		$0	$0	$0	100.0%	$0		
	TOTAL - ALCOHOL/SUBSTANCE ABUSE		$4,363,608	$328,612	$0	100.0%	$328,612		
120	1/ Specifically for FAS research at U. of Wash. Supported by Congressional language.								
121	2/ Specifically for Gallup Alcohol Program. Supported by Congressional language.								
122	3/ Fund specific projects through MOA w/Secretary DHHS and are not available for compacting								
123	4/ Funds projects for specific tribes.								
124	*								
125	0								
126	PUBLIC HEALTH NURSING:								
127	Preventive Health Initiatives		$908,400	$68,409	$0	100.0%	$68,409		
128	TOTAL - PUBLIC HEALTH NURSING		$908,400	$68,409	$0	100.0%	$68,409		
129	*								
130	0								
131	HEALTH EDUCATION:								
132	HIV/AIDS		$563,125	$42,408	$0	100.0%	$42,408		
133	Physical Fitness Initiative		$34,578	$2,604	$0	100.0%	$2,604		
134	Prevention Initiative		$535,597	$40,334	$0	100.0%	$40,334		
135	TOTAL - HEALTH EDUCATION		$1,133,300	$85,346	$0	100.0%	$85,346		
136	*								
137	0								
138	COMMUNITY HLTH REPRESENTATIVES:								
139	3-Week Regional Basic Training		$605,323	$45,585	$0	100.0%	$45,585		
140	Specialty/Advanced/Refresher		$397,934	$29,967	$0	100.0%	$29,967		
141	Training Program Support		$125,486	$9,450	$0	100.0%	$9,450		
142	National Training Committee		$34,951	$2,632	$0	100.0%	$2,632		
	Uniband Contract		$0	$0	$0	100.0%	$0		
	echnical Support (MOU w/OSM)		$0	$0	$0	100.0%	$0		
	A w/PHS Operations Med Info Lab		$68,428	$5,153	$0	100.0%	$5,153		

FY 1996 HQ General Funds Pool — AFA Detail by Account — 05/12/95 03:16 PM

	"A Shares by HQ Acct. Enter AFA Name "exactly" below: CHEROKEE NATION — 100% TSA Share of HQ Pool: $4,752,391	Shares from Program Formula	TSA Pool Funds: $ Available in each HQ Account	TSA Pool Funds: Share IF 100% Compacted	Adjustments to C if an: Oklahoma Inter-Tribal Agreements	Adjustments to C if an: Enter % IF NOT 100%*	Shares Eligible for Compact	Enter Negotiated Amount of F	Enter Retained Amount of F
		A	B	C	D	E	F	G	H
146	CHR PCC & Tech. Implement		$710,597	$53,513	$0	100.0%	$53,513		
147	CHR PSG-NPM Committee		$32,319	$2,434	$0	100.0%	$2,434		
148	Joint Annual Mtg w/NACHR		$34,530	$2,600	$0	100.0%	$2,600		
149	Area Reviews w/NACHR		$16,844	$1,268	$0	100.0%	$1,268		
150	ABQ Nov. Natl Consult Conference		$14,528	$1,094	$0	100.0%	$1,094		
151	Quarterly Report to Field (Update)		$17,581	$1,324	$0	100.0%	$1,324		
152	Contingency		$49,555	$3,732	$0	100.0%	$3,732		
153	TOTAL - CHR		$2,108,075	$158,754	$0	100.0%	$158,754		
154	*								
155	0								
156	INDIAN HEALTH PROFESSIONS:								
157	Sec. 102 - Recruitment Program		$0	$0	$0	100.0%	$0		
158	Sec. 105 - Extern Program		$0	$0	$0	100.0%	$0		
159	Sec. 103 - Preparatory Program		$0	$0	$0	100.0%	$0		
160	Sec. 104 - Scholarship Program		$0	$0	$0	100.0%	$0		
161	Sec. 110 - Tribal Recruitment/Retention		$0	$0	$0	100.0%	$0		
162	Sec. 112 - Nursing Program		$0	$0	$0	100.0%	$0		
163	Sec. 114 - IMMED Replic. Program		$0	$0	$0	100.0%	$0		
164	Sec. 108 - Loan Repayment Program		$0	$0	$0	100.0%	$0		
	TOTAL - INDIAN HEALTH PROFESSIONS								
	1/ These legislative provisions comprising the IHP category are subject, by law, to national competition and/or are designated for Indi4duals.								
	These provisions are also legislatively earmarked for scholarships and recruitment activities.								
	*								
169	0								
170	TRIBAL MANAGEMENT:								
171	Tribal Management Grants		$0	$0	$0	100.0%	$0		
172	TOTAL - TRIBAL MANAGEMENT		$0	$0	$0	100.0%	$0		
173	0								
174	DIRECT OPERATIONS:		$0	$0	$0	100.0%	$0		
175	OFFICE OF THE DIRECTOR		$852,888	$64,229	$0	100.0%	$64,229		
176	OFFICE OF ADMIN. & MANAGEMENT		$3,376,934	$254,459	$0	100.0%	$254,459		
177	OFFICE OF PLANNING, EVAL & LEGISLTN		$1,575,867	$118,675	$0	100.0%	$118,675		
178	OFFICE OF INFO. RESOURCES MGMT		$1,875,926	$141,271	$0	100.0%	$141,271		
179	OFFICE OF TRIBAL ACTIVITIES		$565,956	$42,621	$0	100.0%	$42,621		
180	OFFICE OF HUMAN RESOURCES		$1,996,822	$150,376	$0	100.0%	$150,376		
181	OFFICE OF HEALTH PROGRAMS		$3,218,153	$242,351	$0	100.0%	$242,351		
182	OFFICE OF HLTH PROGR. RES. & DVLPMT		$632,282	$47,616	$0	100.0%	$47,616		
183	HDQTRS WEST		$1,744,800	$131,397	$0	100.0%	$131,397		
184	Special Pay 1/		$0	$0	$0	100.0%	$0		
185	TOTAL - DIRECT OPERATIONS		$15,841,630	$1,192,994	$0	100.0%	$1,192,994		
186	1/ Based on eligibility.								
187	*								
188	0								
189	CONTRACT SUPPORT COSTS:								
190	Contract Support Costs		$0	$0	$0	100.0%	$0		
	TOTAL-CONTRACT SUPPORT COSTS		$0	$0	$0	100.0%	$0		
			*	$0	$0	100.0%	$0		
	0		$0	$0	$0	100.0%	$0		

FY 1996 HQ General Funds Pool — AFA Detail by Account — 05/12/95 03:16 PM

	"A Shares by HQ Acct. Enter AFA Name "exactly" below: CHEROKEE NATION — 100% TSA Share of HQ Pool: $4,752,391	Shares from Program Formula	TSA Pool Funds: $ Available in each HQ Account	TSA Pool Funds: Share IF 100% Compacted	Adjustments to C if an: Oklahoma Inter-Tribal Agreements	Adjustments to C if an: Enter % IF NOT 100%*	Shares Eligible for Compact	Enter Negotiated Amount of F	Enter Retained Amount of F
		A	B	C	D	E	F	G	H
194	CONTRACT HEALTH SERVICE:		$0	$0	$0	100.0%	$0		
195	Fiscal Intermediary 1/		$0	$0	$0	100.0%	$0		
196	Quality Assurance 2/		$0	$0	$0	100.0%	$0		
197	Deferred Services 3/		$0	$0	$0	100.0%	$0		
198	CHS Reserve & Undistributed		$1,532,357	$115,398	$0	100.0%	$115,398		
199	CHEF X0390 Account Funds 4/		$0	$0	$0	100.0%	$0		
200	Unmet Need 5/		$0	$0	$0	100.0%	$0		
201	TOTAL-CONTRACT HEALTH SERVICE		$1,532,357	$115,398	$0	100.0%	$115,398		
202	1/ Obligated for FI contract and based on actual utilization.								
203	2/ Given to areas for QA proposals.								
204	3/ Distribution based on pop. growth, health status and reported deferred services.								
205	4/ CHEF not to be contracted or compacted per PL 437. Supported by Congressional language.								
206	5/ Distribution based on workload/costs, health status, and CHS dependency								
207	*								
208	INDIAN HEALTH FACILITIES:								
209	O.E.H.E. SUPPORT:								
210	San. Facilities Constr. Support	$11,583	$0	$0	$0	100.0%	$0		
211	Environ. Health Services Support	$7,518	$0	$0	$0	100.0%	$0		
212	Facilities & Real Property Support	$0	$0	$0	$0	100.0%	$0		
	Facilities Plan & Construction Support	$0	$0	$0	$0	100.0%	$0		
	Engineering Services Support	$447	$0	$0	$0	100.0%	$0		
			$0	$0	$0	100.0%	$0		
	FUNDS MANAGED BY HQ FOR AREA/PROJECTS: 5/		$0	$0	$0	100.0%	$0		
217	Environmental Health Support		$0	$0	$0	100.0%	$0		
218	Reimbursements		$0	$0	$0	100.0%	$0		
219	Maintenance & Improvement		$0	$0	$0	100.0%	$0		
220	Sanitation Facilities		$0	$0	$0	100.0%	$0		
221	Health Care Facilities		$0	$0	$0	100.0%	$0		
222	Equip Replacement Reqmt	$126,784	$0	$0	$0	100.0%	$0		
223	TOTAL - INDIAN HEALTH FACILITIES		$0	$0	$0	100.0%	$0		
224	1/ Based on workload, proportional share of funds made available based on each tribe's representative workload.								
225	2/ Supports functions related to new requirements to lease or deed property. $434,341 available; $504,000 not available.								
226	3/ Construction of Federal facilities under OGC opinion are not compactible. No funds available.								
227	4/ Construction of Federal facilities under OGC opinion are not compactible. Add'l leasing also supported on this line. $733,171 available; $4,634,758 not available.								
228	5/ Does not support HQs personnel costs.								
229	6/ Congressional mandates (includes $100,000 to HQW for nat'l operation and maintenance training) & reimbursements.								
230	7/ Congressional mandates & nat'l priority for environmental audits and remediation.								
231	8/ $500,000 reserved for emergency projects. Unused funds roll into next FY M&I distribution.								
232	9/ Not at HQs. Distributed in bulk to Areas which distribute funds based on Congress mandates by project, utilizing project scope, addendum to AFA process.								
233	10/$500,000 of sanitation facilities funds reserved for Area Emergency Projects; another $500,000 reserved for Area special projects.								
234	11/Funds earmarked for Ft. Belknap & White Earth facilities.								
0	12/Based on comparative need of tribal facilities constructed with non-IHS funds.								
0	13/ Represents a portion of the $232,084,000 from Facilities Appropriation implemented at the Area/local levels.								
0	TOTAL HEADQUARTERS - FY 199	$149,854	$63,106,454	$4,752,391	$0		$4,752,391	$0	$0

Table attached to Declaration of Daniel J. Cesari, Deputy Director of the Division of Financial Management at the Headquarters of the Indian Health Service, dated Feb. 18, 1999 [See JA Vol. I, PART 2 for Declaration of Daniel J. Cesari]

INDIAN HEALTH SERVICE
FY 1996 Reduction of Funds by Area to Support Full Funding of Contract Support Costs

		Aberdeen	Alaska	Albuquerque	Bemidji	Billings	California	Nashville	Navajo	Oklahoma	Phoenix	Portland	Tucson	HQ	TOTAL
		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)
(A)	NET ANNUAL SVCS APPROP	$118,946,447	$381,409,897	$49,999,791	$67,076,916	$67,354,969	$34,467,854	$33,965,736	$268,834,216	$173,048,477	$110,374,399	$91,784,313	$32,039,470	$151,929,994	1,373,243,597
(B)	EXCLUSIONS														
(C)	Title I	($33,196,836)	($26,709,851)	($17,969,148)	($36,137,131)	($12,012,891)	($67,334,869)	($30,033,301)	($30,016,473)	($33,256,458)	($36,033,973)	($42,392,893)	($3,463,876)	$0	($369,457,351)
(D)	Title III	$0	($91,718,073)	$0	($10,176,302)	($9,886,919)	($3,164,439)	($10,383,990)	$0	($15,783,693)	($2,340,304)	($31,303,367)	$0	$0	($364,918,43)
(E)	Budgets	($920,000)	($26,908,033)	$0	($1,065,904)	($1,111,999)	($788,139)	($307,698)	$0	($11,463,937)	($2,863,701)	($4,263,077)	$0	($1,370,049)	($53,114,93
(F)	SUBTOTAL Title I & III	($34,096,836)	($143,436,011)	($17,969,148)	($48,000,337)	($23,011,799)	($71,479,437)	($41,441,701)	($30,016,473)	($60,508,089)	($37,239,978)	($67,959,413)	($3,463,876)	($1,370,049)	($806,490,33
(G)	ADJUSTED SVCS FUNDING FED OPS	$83,850,611	$33,993,886	$32,030,133	$33,078,599	$44,343,570	$3,988,397	$32,324,033	$143,780,161	$82,342,378	$83,334,041	$23,825,102	$33,634,334	$150,559,945	568,334,46
(H)	Area % of Rev Allowance	11.3%	7.3%	6.8%	1.7%	3.8%	0.4%	1.6%	19.4%	10.7%	10.0%	3.1%	3.8%	10.3%	100.0
(I)	AREA SHARE OF $39.3M	($3,363,047)	($2,132,307)	($1,977,709)	($497,850)	($1,483,433)	($113,583)	($468,418)	($5,434,913)	($3,137,313)	($3,991,400)	($996,347)	($393,477)	($1,903,529)	($39,339,97
(J)	Distribution of $39.3M Reduction														
(K)	- 30% Expenses other than Salaries	($633,809)	($432,643)	($395,642)	($99,430)	($337,887)	($22,717)	($93,684)	($1,130,983)	($627,463)	($818,283)	($181,269)	($118,693)	($1,140,706)	($3,843,99
(L)	- 70% Salaries and Benefits	($2,838,438)	($1,702,363)	($1,581,367)	($397,420)	($1,345,343)	($90,866)	($374,733)	($4,333,931)	($2,509,831)	($3,172,117)	($723,078)	($274,783)	($1,362,836)	($31,535,98
(Ma)	Area Avg Salary and Benefits	$42,137	$43,731	$48,771	$48,662	$41,734	$43,936	$41,947	$41,313	$39,950	$41,804	$39,376	$48,332	$34,923	
(Mb)	Calculation of Area FTE Reduction														
(Mc)	Area FTE Reduction	(63)	(39)	(39)	(10)	(33)	(2)	(9)	(100)	(63)	(39)	(28)	(12)	(33)	(53
(M)	Area FY 1996 FTE Allowance	1,697	1,341	1,002	333	967	97	391	3,777	3,808	2,833	630	280	637	14,40
(Q)	Revised FTE Allowance (rounding)	1,630	1,302	1,013	343	921	95	382	3,589	3,745	2,794	592	270	554	13,86
	Calculation of Separation Costs (Five Year Only)														
(R)	Avg Severance Pay/Lump Sum Pay 1/	$26,879	$26,876	$23,386	$23,331	$23,877	$27,988	$23,934	$23,838	$24,993	$23,903	$24,932	$23,276	$22,483	$42,96
(T)	Area Funding Reduction for FTE	($1,814,836)	($1,045,053)	($984,864)	($247,748)	($835,619)	($51,366)	($233,032)	($1,864,198)	($1,868,733)	($1,332,313)	($453,456)	($295,931)	($1,898,413)	($14,367,34
U	Further Area FTE Reductions	(76)	(24)	(24)	(6)	(20)	(1)	(6)	(67)	(39)	(27)	(11)	(7)	(19)	(33

1/ To calculate severance pay: 80% of Area's avg salary and 75% of HQ avg salary. An avg of $3,000 used for lump sum pay

SUMMARY OF REDUCTION:

Funding:

Expenses other than Salaries	$3,843,993
Salaries and Benefits - Permanent	$32,395,982
Salaries and Benefits - Five Year only	$14,367,343
Total, Funding Reduction -five year	$49,307,318

Employment:

Permanent FTE Reduction	(536)
Five Year only FTE Reduction	(130)
Total, FTE Reduction -five year	(666)

[This Page Intentionally Left Blank]

Tables attached to Declaration of Carl L. Fitzpatrick, Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service, dated Mar. 27, 2000

[See JA Vol. I, PART 2 for Declaration of Carl L. Fitzpatrick]

EXHIBIT 1

HISTORY OF FY 1996 REQUEST

INDIAN HEALTH SERVICE

SERVICES APPROPRIATION

(Dollars in Thousands)

09/23/96

FILE: O:\SSO\BASE\FY96\WS\SUBTSUB	Request to PHS	Request to DHHS	Request to OMB	Request to Congress	Request to House	Request to Senate	Request to Conference	Appropriation With $26 M	Appropriation With Rescission	Revised Appropriation (7/5/96)
FY 1995 Appropriation	**$1,706,102** (95 House Mk)	**$1,706,102** (95 House Mk)	**$1,706,102** (95 House Mk)	**$1,709,780** (Appropriation)	**$1,709,780** (Enacted)	**$1,798,580** (Enacted)	**$1,709,780** (Enacted)	**$1,709,780** (Enacted)	**$1,709,780** (Enacted)	**$1,709,780** (Enacted)
MANDATORIES										
Built-in Increases	78,555	78,555	77,047	78,068	0	0	0	19,500	18,867	18,152
Indian Self-Determination Fund	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500	7,500
Subtotal, Mandatories	84,055	84,055	84,547	85,568	7,500	7,500	7,500	27,000	24,467	23,652
FTE REDUCTION	0	0	0	0	0	0	0	0	0	0
CONTRACT FOR HEALTH CARE DELIVE	0	0	0	0	0	0	0	0	0	0
PROGRAM INCREASES										
Staffing New Facilities										
Kotzebue, AK, Hospital	840	840	840	840	840	840	840	840	840	840
Shiprock, NM, Hospital	6,392	6,392	6,392	6,392	6,392	6,392	6,392	6,392	6,392	6,392
Alaska Native Med.Ctr., AK	3,144	3,144	3,144	3,144	3,144	3,312	3,144	3,144	3,144	3,144
Harlem Health Ctr., MT	136	136	136	0	0	0	0	0	0	0
Hays Health Ctr., MT	1,620	1,620	1,620	136	136	289	136	136	136	136
Subtotal - Staffing for New Facs.	12,132	12,132	12,132	10,512	10,512	10,813	10,512	10,512	10,512	10,512
Population Growth	13,231	13,231	13,344	0	0	0	0	0	0	0
Women's Health	5,000	5,000	250	250	0	0	0	0	0	0
Elderly	5,000	5,000	250	250	0	0	0	0	0	0
Epidemiology	0	0	750	750	0	750	750	750	750	750
Information System Initiative	10,000	10,000	1,500	1,500	0	750	0	0	0	0
Collect/Billing Systems	0	0	0	0	0	1,500	1,500	1,500	1,500	1,500
Child Abuse	10,000	10,000	250	250	0	0	0	0	0	0
Alcohol Aftercare	0	0	0	0	0	0	0	0	0	0
Contract Health Care	0	0	5,500	2,500	0	0	0	2,500	2,500	2,500
Urban Health	0	0	0	1,200	0	0	0	0	0	3,000
Indian Into Psychology	0	0	0	0	0	0	200	200	200	200
Indian Self-Determination Fund	0	0	0	3,770	0	0	0	0	0	0
Contract Support Cost	2,500	2,500	4,500	0	0	0	0	0	0	0
Contract Support Cost Shortfall	0	0	0	0	0	0	0	0	0	0
Injury Prevention	0	0	0	0	0	500	0	0	0	0
OSAH Staffing Transfer	0	0	0	0	0	400	0	0	0	0
Facilities Staffing Cost	0	0	0	0	0	0	0	3,000	3,000	0
Subtotal, Program Increases	57,883	57,883	38,478	20,982	10,512	14,713	12,982	18,482	18,482	18,482
PROGRAM REDUCTION										
OSAH Staffing Transfer	0	0	0	0	0	(400)	(400)	(400)	(400)	(400)
Surgeon General's Office	(161)	(161)	0	0	0	0	0	0	0	0
Indian Health Profession	0	0	0	0	0	(2,000)	(2,000)	(2,000)	(2,000)	(2,000)
Tribal Management	0	0	0	0	0	(3,000)	(3,000)	(3,000)	(3,000)	(3,000)
Direct Operation	0	0	0	0	(2,000)	0	(2,000)	(2,000)	(2,000)	(2,000)
Subtotal, Program Increases	(161)	(161)	0	0	(2,000)	(5,400)	(7,400)	(7,400)	(7,400)	(7,400)
TOTAL, IHS REQUEST	**$1,847,859**	**$1,847,859**	**$1,829,125**	**$1,816,350**	**$1,725,792**	**$1,815,373**	**$1,722,842**	**$1,747,842**	**$1,745,309**	**$1,744,494**

EXHIBIT 2

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

ALL AREA SUMMARY

17-Oct-96

ACTIVITY/SUB-ACTIVITY	TOTAL AREA FY 1996 ALLOCATION			FY1996 APPROPRIATION	FY1996 UNALLOCATED
	RECURRING	NON-RECURRING	TOTAL		
CLINICAL SERVICES:					
HOSPITALS & CLINICS	$843,005,117	($89,378,979)	$753,626,138	$753,626,138	$0
DENTAL	58,948,100	(7,130,973)	51,817,127	51,817,127	0
MENTAL HEALTH	36,497,500	(4,542,266)	31,955,234	31,955,234	0
ALCOHOL/SUBSTANCE ABUSE	89,157,400	(11,189,752)	77,967,648	77,967,648	0
REIMBURSEMENTS	0	13,225,715	13,225,715	13,225,715	0
TOTAL CLINICAL SERVICES	$1,027,608,117	($99,016,255)	$928,591,862	$928,591,862	$0
PREVENTIVE HEALTH:					
PUBLIC HEALTH NURSING	$23,280,000	($1,891,526)	$21,388,474	$21,388,474	$0
HEALTH EDUCATION	7,231,300	(461,547)	6,769,753	6,769,753	0
COMMUNITY HEALTH REPS	41,664,485	(6,849,488)	34,814,997	34,814,997	0
IMMUNIZATION	1,328,000	(409,046)	918,954	918,954	0
TOTAL PREVENTIVE HEALTH	$73,503,785	($9,611,607)	$63,892,178	$63,892,178	$0
URBAN PROJECTS	23,768,000	0	23,768,000	23,768,000	0
INDIAN HLTH PROFESSIONS	0	26,244,000	26,244,000	26,244,000	0
TRIBAL MANAGEMENT	0	2,348,000	2,348,000	2,348,000	0
DIRECT OPERATIONS	47,432,000	(4,461,704)	42,970,296	42,970,296	0
CONTRACT SUPPORT COSTS	141,253,881	(52,183,062)	89,070,819	89,070,819	0
SELF-GOVERNANCE	424,300	211,161,260	211,585,560	211,585,560	0
TOTAL ALLOWANCES ISSUED	$1,313,990,083	$74,480,632	$1,388,470,715	$1,388,470,715	$0
W/O REIMBURSEMENTS		61,254,917	1,375,245,000	1,375,245,000	0

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

ALL AREA SUMMARY

17-Oct-96

ACTIVITY/SUB-ACTIVITY	ABERDEEN	ALASKA	ALBUQUERQUE	BEMIDJI	BILLINGS	CALIFORNIA	HEADQUARTERS	HQ-WEST
CLINICAL SERVICES:								
HOSPITALS & CLINICS	$79,869,364	$85,803,975	$44,546,956	$31,589,161	$37,330,421	$38,086,472	$54,909,638	$8,467,629
DENTAL	6,601,800	3,806,109	4,337,600	1,549,909	3,329,769	745,270	119,331	327,000
MENTAL HEALTH	5,828,800	1,521,849	2,781,100	1,124,319	2,114,570	961,894	544,975	819,420
ALCOHOL/SUBSTANCE ABUSE	8,225,400	4,379,991	7,590,500	5,133,585	5,686,202	6,916,055	1,005,317	1,009,745
REIMBURSEMENTS	364,851	4,048,079	883,048	52,434	292,243	6,000	996,817	934,285
TOTAL CLINICAL SERVICES	$100,888,015	$99,559,803	$59,919,204	$39,449,408	$48,733,205	$46,715,491	$57,576,078	$11,558,189
PREVENTIVE HEALTH:								
PUBLIC HEALTH NURSING	$3,680,600	$311,765	$1,863,900	$808,613	$1,639,830	$240,274	$25,792	$0
HEALTH EDUCATION	937,900	251,789	814,900	245,720	621,174	230,097	199,200	0
COMMUNITY HEALTH REPS	5,304,539	551,241	2,568,000	2,419,232	2,863,103	1,457,668	102,175	0
IMMUNIZATION	0	918,954	0	0	0	0	0	0
TOTAL PREVENTIVE HEALTH	$9,923,039	$2,033,729	$5,246,800	$3,273,565	$4,924,107	$1,928,039	$327,167	$0
URBAN PROJECTS	797,425	0	484,925	2,714,600	1,090,300	4,186,550	7,401,150	0
INDIAN HLTH PROFESSIONS	92,000	11,755	48,000	1,300	70,875	14,350	25,738,870	0
TRIBAL MANAGEMENT	0	1,925	0	0	0	21,200	2,321,225	1,175
DIRECT OPERATIONS	1,960,250	2,307,209	1,142,275	975,413	1,514,385	1,010,467	21,250,655	1,417,440
CONTRACT SUPPORT COSTS	7,225,500	12,254,942	4,128,074	6,212,200	2,314,194	18,897,000	0	0
SELF-GOVERNANCE	0	71,384,727	2,175	2,500	0	0	140,181,433	7,975
TOTAL ALLOWANCES ISSUED	$120,886,229	$187,554,090	$70,969,453	$52,628,986	$58,646,866	$72,573,097	$254,756,378	$12,984,779

ACTIVITY/SUB-ACTIVITY	NASHVILLE	NAVAJO	OKLAHOMA	PHOENIX	PORTLAND	TUCSON	TOTAL AREA ALLOCATION	FY1996 APPROPRIATION
CLINICAL SERVICES:								
HOSPITALS & CLINICS	$24,299,045	$122,351,291	$86,320,877	$81,835,625	$33,580,484	$12,654,880	$753,626,138	$753,626,138
DENTAL	1,072,312	12,394,000	7,589,688	5,122,463	4,067,076	754,800	51,817,127	51,817,127
MENTAL HEALTH	860,917	5,393,026	3,091,851	3,705,718	2,436,895	782,700	31,955,234	31,955,234
ALCOHOL/SUBSTANCE ABUSE	4,913,968	10,744,162	5,188,381	8,137,918	7,074,924	2,001,500	77,967,648	77,967,648
REIMBURSEMENTS	124,994	694,088	371,452	4,187,541	434,236	45,837	13,225,715	13,225,715
TOTAL CLINICAL SERVICES	$31,271,236	$151,576,567	$114,532,049	$102,999,265	$47,573,625	$16,239,427	$928,591,862	$928,591,862
PREVENTIVE HEALTH:								
PUBLIC HEALTH NURSING	$338,215	$5,552,719	$1,812,635	$3,329,117	$1,751,214	$432,800	$21,388,474	$21,388,474
HEALTH EDUCATION	295,874	1,121,548	510,211	924,233	580,327	56,800	6,769,753	6,769,753
COMMUNITY HEALTH REPS	2,134,880	5,443,844	3,344,011	4,457,345	2,742,849	1,848,500	34,814,997	34,814,997
IMMUNIZATION	0	0	0	0	0	0	918,954	918,954
TOTAL PREVENTIVE HEALTH	$2,738,779	$12,117,911	$5,466,857	$8,690,695	$5,084,390	$2,136,100	$63,892,178	$63,892,178
URBAN PROJECTS	603,050	289,875	1,128,200	1,379,300	3,407,975	304,850	23,768,000	23,768,000
INDIAN HLTH PROFESSIONS	1,100	45,800	45,800	150,580	24,400	0	26,244,000	26,244,000
TRIBAL MANAGEMENT	1,375	0	0	1,100	0	0	2,348,000	2,348,000
DIRECT OPERATIONS	1,367,328	2,435,000	2,403,543	2,358,558	1,870,489	957,306	42,970,296	42,970,296
CONTRACT SUPPORT COSTS	8,783,727	3,847,500	5,135,011	4,965,714	14,509,157	999,800	89,070,819	89,070,819
SELF-GOVERNANCE	3,150	0	0	0	3,800	0	211,585,560	211,585,560
TOTAL ALLOWANCES ISSUED	$44,770,745	$170,292,753	$128,711,260	$120,545,180	$72,473,816	$20,637,283	$1,388,470,715	$1,388,470,715

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

ABERDEEN 45

17-Oct-96

ACTIVITY/SUB-ACTIVITY	TOTAL AREA FY 1996 ALLOCATION RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$78,810,750	$1,058,614	$79,869,364
DENTAL	6,601,800	0	6,601,800
MENTAL HEALTH	5,816,300	10,300	5,826,600
ALCOHOL/SUBSTANCE ABUSE	8,123,400	102,000	8,225,400
REIMBURSEMENTS	0	364,851	364,851
TOTAL CLINICAL SERVICES	$99,352,250	$1,535,765	$100,888,015
PREVENTIVE HEALTH:			
UBLIC HEALTH NURSING	$3,604,600	$76,000	$3,680,600
EALTH EDUCATION	891,800	46,100	937,900
COMMUNITY HEALTH REPS	5,171,500	133,039	5,304,539
IMMUNIZATION	0	0	0
TOTAL PREVENTIVE HEALTH	$9,667,900	$255,139	$9,923,039
URBAN PROJECTS	796,300	1,125	797,425
INDIAN HLTH PROFESSIONS	0	92,000	92,000
TRIBAL MANAGEMENT	0	0	0
DIRECT OPERATIONS	1,957,400	2,850	1,960,250
CONTRACT SUPPORT COSTS	7,225,500	0	7,225,500
SELF-GOVERNANCE	0	0	0
TOTAL ALLOWANCES ISSUED	$118,999,350	$1,886,879	$120,886,229

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

ALASKA 59

17-Oct-96

ACTIVITY/SUB-ACTIVITY	TOTAL AREA FY 1996 ALLOCATION RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$131,420,471	($45,616,496)	$85,803,975
DENTAL	7,068,500	(3,262,391)	3,806,109
MENTAL HEALTH	3,126,100	(1,604,451)	1,521,649
ALCOHOL/SUBSTANCE ABUSE	8,886,700	(4,506,709)	4,379,991
REIMBURSEMENTS	0	4,048,079	4,048,079
TOTAL CLINICAL SERVICES	$150,501,771	($50,941,968)	$99,559,803
PREVENTIVE HEALTH:			
UBLIC HEALTH NURSING	$701,500	($389,735)	$311,765
EALTH EDUCATION	859,900	(608,131)	251,769
COMMUNITY HEALTH REPS	3,224,212	(2,672,971)	551,241
IMMUNIZATION	1,328,000	(409,046)	918,954
TOTAL PREVENTIVE HEALTH	$6,113,612	($4,079,883)	$2,033,729
URBAN PROJECTS	0	0	0
INDIAN HLTH PROFESSIONS	0	11,755	11,755
TRIBAL MANAGEMENT	0	1,925	1,925
DIRECT OPERATIONS	3,002,200	(694,991)	2,307,209
CONTRACT SUPPORT COSTS	40,239,489	(27,984,547)	12,254,942
SELF-GOVERNANCE	0	71,384,727	71,384,727
TOTAL ALLOWANCES ISSUED	$199,857,072	($12,302,982)	$187,554,090

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

ALBUQUERQUE 53

17-Oct-96

ACTIVITY/SUB-ACTIVITY	TOTAL AREA FY 1996 ALLOCATION RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$44,082,150	$464,806	$44,546,956
DENTAL	4,333,600	4,000	4,337,600
MENTAL HEALTH	2,746,500	34,600	2,781,100
ALCOHOL/SUBSTANCE ABUSE	7,533,500	57,000	7,590,500
REIMBURSEMENTS	0	663,048	663,048
TOTAL CLINICAL SERVICES	$58,695,750	$1,223,454	$59,919,204
PREVENTIVE HEALTH:			
UBLIC HEALTH NURSING	$1,839,400	$24,500	$1,863,900
EALTH EDUCATION	749,800	65,100	814,900
COMMUNITY HEALTH REPS	2,475,600	92,400	2,568,000
IMMUNIZATION	0	0	0
TOTAL PREVENTIVE HEALTH	$5,064,800	$182,000	$5,246,800
URBAN PROJECTS	483,700	1,225	484,925
INDIAN HLTH PROFESSIONS	0	48,000	48,000
TRIBAL MANAGEMENT	0	0	0
DIRECT OPERATIONS	1,064,000	78,275	1,142,275
CONTRACT SUPPORT COSTS	4,126,074	0	4,126,074
SELF-GOVERNANCE	0	2,175	2,175
TOTAL ALLOWANCES ISSUED	$69,434,324	$1,535,129	$70,969,453

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

BEMIDJI 46

17-Oct-96

ACTIVITY/SUB-ACTIVITY	TOTAL AREA FY 1996 ALLOCATION RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$35,589,390	($4,000,229)	$31,589,161
DENTAL	1,809,300	(259,391)	1,549,909
MENTAL HEALTH	1,282,000	(157,681)	1,124,319
ALCOHOL/SUBSTANCE ABUSE	5,901,600	(768,015)	5,133,585
REIMBURSEMENTS	0	52,434	52,434
TOTAL CLINICAL SERVICES	$44,582,290	($5,132,882)	$39,449,408
PREVENTIVE HEALTH:			
PUBLIC HEALTH NURSING	$595,000	$13,613	$608,613
HEALTH EDUCATION	256,300	(10,580)	245,720
COMMUNITY HEALTH REPS	2,888,200	(468,968)	2,419,232
IMMUNIZATION	0	0	0
TOTAL PREVENTIVE HEALTH	$3,739,500	($465,935)	$3,273,565
URBAN PROJECTS	2,714,600	0	2,714,600
INDIAN HLTH PROFESSIONS	0	1,300	1,300
TRIBAL MANAGEMENT	0	0	0
DIRECT OPERATIONS	1,126,800	(151,387)	975,413
CONTRACT SUPPORT COSTS	8,179,942	(1,967,742)	6,212,200
SELF-GOVERNANCE	0	2,500	2,500
TOTAL ALLOWANCES ISSUED	$60,343,132	($7,714,146)	$52,628,986

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

BILLINGS 47

17-Oct-96

ACTIVITY/SUB-ACTIVITY	TOTAL AREA FY 1996 ALLOCATION RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$37,987,750	($657,329)	$37,330,421
DENTAL	3,639,800	(310,031)	3,329,769
MENTAL HEALTH	2,458,700	(344,130)	2,114,570
ALCOHOL/SUBSTANCE ABUSE	7,268,900	(1,602,698)	5,666,202
REIMBURSEMENTS	0	292,243	292,243
TOTAL CLINICAL SERVICES	$51,355,150	($2,621,945)	$48,733,205
PREVENTIVE HEALTH:			
PUBLIC HEALTH NURSING	$1,752,500	($112,670)	$1,639,830
HEALTH EDUCATION	731,500	(110,326)	621,174
COMMUNITY HEALTH REPS	3,240,185	(577,082)	2,663,103
IMMUNIZATION	0	0	0
TOTAL PREVENTIVE HEALTH	$5,724,185	($800,078)	$4,924,107
URBAN PROJECTS	1,090,300	0	1,090,300
INDIAN HLTH PROFESSIONS	0	70,675	70,675
TRIBAL MANAGEMENT	0	0	0
DIRECT OPERATIONS	1,732,800	(218,415)	1,514,385
CONTRACT SUPPORT COSTS	5,545,840	(3,231,646)	2,314,194
SELF-GOVERNANCE	0	0	0
TOTAL ALLOWANCES ISSUED	$65,448,275	($6,801,409)	$58,646,866

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

CALIFORNIA 41

17-Oct-96

ACTIVITY/SUB-ACTIVITY	TOTAL AREA FY 1996 ALLOCATION RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$39,426,450	($1,339,978)	$38,086,472
DENTAL	739,000	6,270	745,270
MENTAL HEALTH	984,800	(23,106)	961,694
ALCOHOL/SUBSTANCE ABUSE	7,239,000	(322,945)	6,916,055
REIMBURSEMENTS	0	6,000	6,000
TOTAL CLINICAL SERVICES	$48,389,250	($1,673,759)	$46,715,491
PREVENTIVE HEALTH:			
PUBLIC HEALTH NURSING	$223,000	$17,274	$240,274
HEALTH EDUCATION	169,100	60,997	230,097
COMMUNITY HEALTH REPS	1,438,900	18,768	1,457,668
IMMUNIZATION	0	0	0
TOTAL PREVENTIVE HEALTH	$1,831,000	$97,039	$1,928,039
URBAN PROJECTS	4,184,100	2,450	4,186,550
INDIAN HLTH PROFESSIONS	0	14,350	14,350
TRIBAL MANAGEMENT	0	21,200	21,200
DIRECT OPERATIONS	1,049,600	(39,133)	1,010,467
CONTRACT SUPPORT COSTS	18,697,000	0	18,697,000
SELF-GOVERNANCE	0	0	0
TOTAL ALLOWANCES ISSUED	$74,150,950	($1,577,853)	$72,573,097

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

HEADQUARTERS 94

17-Oct-96	TOTAL AREA FY 1996 ALLOCATION		
ACTIVITY/SUB-ACTIVITY	RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$55,960,282	($1,050,644)	$54,909,638
DENTAL	0	119,331	119,331
MENTAL HEALTH	0	544,975	544,975
ALCOHOL/SUBSTANCE ABUSE	0	1,005,317	1,005,317
REIMBURSEMENTS	0	996,817	996,817
TOTAL CLINICAL SERVICES	$55,960,282	$1,615,796	$57,576,078
PREVENTIVE HEALTH:			
UBLIC HEALTH NURSING	$0	$25,792	$25,792
EALTH EDUCATION	0	199,200	199,200
COMMUNITY HEALTH REPS	0	102,175	102,175
IMMUNIZATION	0	0	0
TOTAL PREVENTIVE HEALTH	$0	$327,167	$327,167
URBAN PROJECTS	7,412,200	(11,050)	7,401,150
INDIAN HLTH PROFESSIONS	0	25,738,670	25,738,670
TRIBAL MANAGEMENT	0	2,321,225	2,321,225
DIRECT OPERATIONS	23,843,600	(2,592,945)	21,250,655
CONTRACT SUPPORT COSTS	0	0	0
SELF-GOVERNANCE	424,300	139,757,133	140,181,433
TOTAL ALLOWANCES ISSUED	$87,640,382	$167,155,996	$254,796,378

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

HQ-WEST 65

17-Oct-96	TOTAL AREA FY 1996 ALLOCATION		
ACTIVITY/SUB-ACTIVITY	RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$9,815,974	($1,348,345)	$8,467,629
DENTAL	200,000	127,000	327,000
MENTAL HEALTH	1,258,600	(439,180)	819,420
ALCOHOL/SUBSTANCE ABUSE	1,294,900	(285,155)	1,009,745
REIMBURSEMENTS	0	934,395	934,395
TOTAL CLINICAL SERVICES	$12,569,474	($1,011,285)	$11,558,189
PREVENTIVE HEALTH:			
UBLIC HEALTH NURSING	$0	$0	$0
EALTH EDUCATION	0	0	0
COMMUNITY HEALTH REPS	0	0	0
IMMUNIZATION	0	0	0
TOTAL PREVENTIVE HEALTH	$0	$0	$0
URBAN PROJECTS	0	0	0
INDIAN HLTH PROFESSIONS	0	0	0
TRIBAL MANAGEMENT	0	1,175	1,175
DIRECT OPERATIONS	1,754,200	(336,760)	1,417,440
CONTRACT SUPPORT COSTS	0	0	0
SELF-GOVERNANCE	0	7,975	7,975
TOTAL ALLOWANCES ISSUED	$14,323,674	($1,338,895)	$12,984,779

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

NASHVILLE 51

17-Oct-96

ACTIVITY/SUB-ACTIVITY	TOTAL AREA FY 1996 ALLOCATION RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$31,938,850	($7,639,805)	$24,299,045
DENTAL	1,268,400	(196,088)	1,072,312
MENTAL HEALTH	994,600	(133,683)	860,917
ALCOHOL/SUBSTANCE ABUSE	5,250,500	(336,532)	4,913,968
REIMBURSEMENTS	0	124,994	124,994
TOTAL CLINICAL SERVICES	$39,452,350	($8,181,114)	$31,271,236
PREVENTIVE HEALTH:			
PUBLIC HEALTH NURSING	$392,200	($52,985)	$339,215
HEALTH EDUCATION	253,300	12,574	265,874
COMMUNITY HEALTH REPS	2,259,705	(125,015)	2,134,690
IMMUNIZATION	0	0	0
TOTAL PREVENTIVE HEALTH	$2,905,205	($165,426)	$2,739,779
URBAN PROJECTS	602,000	1,050	603,050
INDIAN HLTH PROFESSIONS	0	1,100	1,100
TRIBAL MANAGEMENT	0	1,375	1,375
DIRECT OPERATIONS	1,364,300	3,028	1,367,328
CONTRACT SUPPORT COSTS	11,515,500	(2,731,773)	8,783,727
SELF-GOVERNANCE	0	3,150	3,150
TOTAL ALLOWANCES ISSUED	$55,839,355	($11,068,610)	$44,770,745

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

NAVAJO 54

17-Oct-96

ACTIVITY/SUB-ACTIVITY	TOTAL AREA FY 1996 ALLOCATION RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$121,914,650	$436,941	$122,351,591
DENTAL	12,326,000	68,000	12,394,000
MENTAL HEALTH	5,389,800	3,226	5,393,026
ALCOHOL/SUBSTANCE ABUSE	10,535,600	208,562	10,744,162
REIMBURSEMENTS	0	694,088	694,088
TOTAL CLINICAL SERVICES	$150,166,050	$1,410,817	$151,576,867
PREVENTIVE HEALTH:			
PUBLIC HEALTH NURSING	$5,491,600	$61,119	$5,552,719
HEALTH EDUCATION	983,300	138,248	1,121,548
COMMUNITY HEALTH REPS	5,214,300	229,344	5,443,644
IMMUNIZATION	0	0	0
TOTAL PREVENTIVE HEALTH	$11,689,200	$428,711	$12,117,911
URBAN PROJECTS	268,000	1,875	269,875
INDIAN HLTH PROFESSIONS	0	45,600	45,600
TRIBAL MANAGEMENT	0	0	0
DIRECT OPERATIONS	2,428,800	6,200	2,435,000
CONTRACT SUPPORT COSTS	3,847,500	0	3,847,500
SELF-GOVERNANCE	0	0	0
TOTAL ALLOWANCES ISSUED	$168,399,550	$1,893,203	$170,292,753

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

OKLAHOMA 50

17-Oct-96

ACTIVITY/SUB-ACTIVITY	TOTAL AREA FY 1996 ALLOCATION RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$122,898,050	($24,577,173)	$98,320,877
DENTAL	10,758,200	(3,168,512)	7,589,688
MENTAL HEALTH	5,104,200	(2,022,549)	3,081,651
ALCOHOL/SUBSTANCE ABUSE	6,649,400	(1,481,019)	5,168,381
REIMBURSEMENTS	0	371,452	371,452
TOTAL CLINICAL SERVICES	$145,409,850	($30,877,801)	$114,532,049
PREVENTIVE HEALTH:			
PUBLIC HEALTH NURSING	$3,155,200	($1,542,565)	$1,612,635
HEALTH EDUCATION	731,600	(221,389)	510,211
COMMUNITY HEALTH REPS	6,323,600	(2,979,589)	3,344,011
IMMUNIZATION	0	0	0
TOTAL PREVENTIVE HEALTH	$10,210,400	($4,743,543)	$5,466,857
URBAN PROJECTS	1,128,200	0	1,128,200
INDIAN HLTH PROFESSIONS	0	45,600	45,600
TRIBAL MANAGEMENT	0	0	0
DIRECT OPERATIONS	2,811,300	(407,757)	2,403,543
CONTRACT SUPPORT COSTS	11,418,395	(6,283,384)	5,135,011
SELF-GOVERNANCE	0	0	0
TOTAL ALLOWANCES ISSUED	$170,978,145	($42,266,885)	$128,711,260

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

PHOENIX 40

17-Oct-96

ACTIVITY/SUB-ACTIVITY	TOTAL AREA FY 1996 ALLOCATION RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$81,938,775	($103,150)	$81,835,625
DENTAL	5,126,000	(3,537)	5,122,463
MENTAL HEALTH	3,768,200	(62,482)	3,705,718
ALCOHOL/SUBSTANCE ABUSE	8,275,400	(137,482)	8,137,918
REIMBURSEMENTS	0	4,197,541	4,197,541
TOTAL CLINICAL SERVICES	$99,108,375	$3,890,890	$102,999,265
PREVENTIVE HEALTH:			
PUBLIC HEALTH NURSING	$3,219,500	$109,617	$3,329,117
HEALTH EDUCATION	915,800	8,433	924,233
COMMUNITY HEALTH REPS	4,491,283	(53,938)	4,437,345
IMMUNIZATION	0	0	0
TOTAL PREVENTIVE HEALTH	$8,626,583	$64,112	$8,690,695
URBAN PROJECTS	1,379,300	0	1,379,300
INDIAN HLTH PROFESSIONS	0	150,550	150,550
TRIBAL MANAGEMENT	0	1,100	1,100
DIRECT OPERATIONS	2,353,100	5,456	2,358,556
CONTRACT SUPPORT COSTS	5,515,544	(549,830)	4,965,714
SELF-GOVERNANCE	0	0	0
TOTAL ALLOWANCES ISSUED	$116,982,902	$3,562,278	$120,545,180

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

PORTLAND 64

17-Oct-96	TOTAL AREA FY 1996 ALLOCATION		
ACTIVITY/SUB-ACTIVITY	RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$38,459,350	($4,898,856)	$33,560,494
DENTAL	4,322,700	(255,624)	4,067,076
MENTAL HEALTH	2,787,900	(351,005)	2,436,895
ALCOHOL/SUBSTANCE ABUSE	10,197,000	(3,122,076)	7,074,924
REIMBURSEMENTS	0	434,236	434,236
TOTAL CLINICAL SERVICES	$55,766,950	($8,193,325)	$47,573,625
PREVENTIVE HEALTH:			
PUBLIC HEALTH NURSING	$1,874,700	($123,486)	$1,751,214
HEALTH EDUCATION	642,100	(51,773)	590,327
COMMUNITY HEALTH REPS	3,439,900	(697,051)	2,742,849
IMMUNIZATION	0	0	0
TOTAL PREVENTIVE HEALTH	$5,956,700	($872,310)	$5,084,390
URBAN PROJECTS	3,405,900	2,075	3,407,975
INDIAN HLTH PROFESSIONS	0	24,400	24,400
TRIBAL MANAGEMENT	0	0	0
DIRECT OPERATIONS	1,848,500	21,969	1,870,469
CONTRACT SUPPORT COSTS	23,943,297	(9,434,140)	14,509,157
SELF-GOVERNANCE	0	3,600	3,600
TOTAL ALLOWANCES ISSUED	$90,921,347	($18,447,731)	$72,473,616

SERVICES APPROPRIATION
RECURRING/NON-RECURRING ALLOCATIONS FOR FY 1996
AS OF SEPTEMBER 30, 1996 FINAL

TUCSON 42

17-Oct-96	TOTAL AREA FY 1996 ALLOCATION		
ACTIVITY/SUB-ACTIVITY	RECURRING	NON-RECURRING	TOTAL
CLINICAL SERVICES:			
HOSPITALS & CLINICS	$12,762,225	($107,335)	$12,654,890
DENTAL	754,800	0	754,800
MENTAL HEALTH	779,800	2,900	782,700
ALCOHOL/SUBSTANCE ABUSE	2,001,500	0	2,001,500
REIMBURSEMENTS	0	45,537	45,537
TOTAL CLINICAL SERVICES	$16,298,325	($58,898)	$16,239,427
PREVENTIVE HEALTH:			
PUBLIC HEALTH NURSING	$430,800	$2,000	$432,800
HEALTH EDUCATION	46,800	10,000	56,800
COMMUNITY HEALTH REPS	1,497,100	149,400	1,646,500
IMMUNIZATION	0	0	0
TOTAL PREVENTIVE HEALTH	$1,974,700	$161,400	$2,136,100
URBAN PROJECTS	303,400	1,250	304,650
INDIAN HLTH PROFESSIONS	0	0	0
TRIBAL MANAGEMENT	0	0	0
DIRECT OPERATIONS	1,095,400	(138,094)	957,306
CONTRACT SUPPORT COSTS	999,800	0	999,800
SELF-GOVERNANCE	0	0	0
TOTAL ALLOWANCES ISSUED	$20,671,625	($34,342)	$20,637,283

Contract Health Care Allocations
75 6/7 0390
As of September 30, 1996 FINAL
FY 1996

30-Sep-96

Area Office	Recurring	Non-Recurring	Total Allocation
Aberdeen	$41,558,900	$258,891	$41,817,791
Alaska	39,467,000	(26,230,165)	13,236,835
Self-Governance	0	17,209,128	17,209,128
Albuquerque	18,671,200	44,628	18,715,828
Bemidji	19,729,700	(3,664,929)	16,064,771
Billings	32,721,100	(10,222,111)	22,498,989
California	8,824,200	(384,062)	8,440,138
HQ-West	0	0	0
HQ-Rockville	6,000,000	92,698	6,092,698
Self-Governance	0	47,186,526	47,186,526
Nashville	14,876,600	(2,600,653)	12,275,947
Navajo	42,326,400	504,102	42,830,502
Oklahoma	44,665,700	(10,197,289)	34,468,411
Phoenix	31,408,000	(1,448,051)	29,959,949
Portland	38,025,100	(6,671,393)	31,353,707
Tucson	8,376,200	36,580	8,412,780
Sub-Total	$346,650,100	$3,913,900	$350,564,000
FY 1996 Appropriation 75 6/7 0390			350,564,000
Balance Available FY 1996			$0

Contract Health Care Allocations
75 5/6 0390
As of September 30, 1996 FINAL
FY 1996

30-Sep-96

Area Office	Recurring	Non-Recurring	Total Allocation
Aberdeen	$41,558,900	$232,502	$41,791,402
Alaska	39,467,000	(28,125,243)	11,341,757
Albuquerque	18,671,200	73,280	18,744,480
Bemidji	19,729,700	(3,602,900)	16,126,800
Billings	32,721,100	(10,438,571)	22,282,529
California	8,824,200	(522,300)	8,301,900
HQ-West	0	0	0
HQ-Rockville	0	6,284,747	6,284,747
Self-Governance	0	65,232,067	65,232,067
Nashville	14,876,600	(2,507,486)	12,369,114
Navajo	42,326,400	410,218	42,736,618
Oklahoma	44,665,700	(8,941,776)	35,723,924
Phoenix	31,408,000	(541,175)	30,866,825
Portland	38,025,100	(7,440,366)	30,584,734
Tucson	8,376,200	(176,000)	8,200,200
Sub-Total	$340,650,100	$9,936,997	$350,587,097
FY 1995 Appropriation 75 5/6 0390			350,587,097
Balance Available FY 1996			$0

09/25/98

Hospitals & Clinics
Reserve Funds

	Directors Emergency Fund	Advice Date	HP/DP Initiatives	Advice Date	Model Diabetes	Advice Date	Nursing Initiatives	Advice Date	Epidemiology Center	Advice Date	Collection & Billing System	Advice Date	Research Projects	Advice Date	COSTEPS Non-Physician	Advice Date	Recruitment & Retention	V	Advice Date	Evaluation	Advice Date	H&C Reserve Totals
Beginning Balance	$4,000,000		$838,800		$224,733		$1,195,200		$750,000		$1,500,000		$469,100		$74,000		$1,707,100			$1,012,500		$11,671,233
Less Tribal Shares Title III	0		0		0		(328,822)	3/13	0		0		(129,057)	3/13	(20,358)	3/13	(329,057)		3/13	(278,586)	3/13	(1,085,850)
Return/Additional Title III Funding	0		0		0		83,647	7/10	0		0		24,978	7/10	3,939	7/10	83,891		7/10	53,913	7/10	210,168
Less Tribal Shares Title I-Round I	0		(40,319)	8/13	(3,547)	8/13	(28,206)	8/13	0		0		(9,219)	8/13	(1,488)	8/13	(20,958)		8/13	(18,882)	8/13	(122,619)
Less Tribal Shares Title I-Round II	0		(10,629)	8/5	(2,070)	8/5	(18,699)	8/5	0		0		(8,029)	8/5	(1,158)	8/5	(9,901)		8/5	(13,012)	8/5	(61,497)
Less Pending Tribl Shrs Title I-Round III & IV	0		(66,885)	9/4	(6,041)	9/4	(37,948)	9/4	0		0		(18,204)	9/4	(2,349)	9/4	(49,634)		9/4	(36,171)	9/4	(217,230)
Revised Reserve Balance	4,000,000		818,768		213,075		845,174		750,000		1,500,000		333,569		52,586		1,361,241			719,792		10,294,205
	(87,578)	11/29	(5,000)	2/15	(150,000)	8/7	(305,300)	3/4	(150,000)	7/17	(25,000)	8/18	(70,000)	2/26	(53,583)	8/5	(1,125)		2/15	(302,600)	3/4	(1,130,187)
	87,578	8/13	(83,400)	5/9	(63,075)	7/17	(254,800)	5/21	(40,000)	8/5	(25,926)	7/17	(263,564)	8/5	1,000	8/18	(1,425)		2/26	(3,000)	3/13	(686,600)
	(177,000)	8/18	(18,000)	5/23			30,800	8/13	(500,000)	8/25	(20,500)	8/5	(15)	9/25	(3)	9/21	(10,800)		2/28	(83,278)	4/24	(778,393)
	(113,600)	6/20	(415,313)	8/15			(122,000)	7/17			(1,000,000)	9/4					(8,550)		3/4	(25,000)	5/1	(1,884,483)
	(33,000)	7/10	(55)	9/21			(142,950)	8/18			5,700	9/4					(225,225)		3/13	(55,400)	5/28	(450,930)
	(500,000)	8/28					(26,000)	9/12			(75,000)	9/12					(25,000)		3/21	(78)	6/7	(725,078)
	(300,000)	9/4									(150,000)	9/12					(50)		3/28	(50,000)	6/20	(500,050)
											(209,275)	9/25					(8,100)		4/24	(50,000)	6/28	(267,375)
																	(825)		5/23	(35,000)	7/1	(35,825)
																	(44,950)		5/28	(44,975)	7/24	(89,925)
																	(2,500)		6/7	(30,075)	8/28	(32,575)
																	(12,050)		6/13	35,000	8/28	22,950
																	(234,125)		7/1	(75,389)	9/4	(309,514)
																	(500)		7/10			(500)
																	(49,000)		7/17			(49,000)
																	(568,575)		7/24			(568,575)
																	(55,000)		8/5			(55,000)
																	(77,000)		8/15			(77,000)
																	(775)		8/28			(775)
																	(3,225)		9/4			(3,225)
																	(32,641)		9/17			(32,641)
Balance Avail	2,776,400		0		0		25,124		60,000		0		0		0		0			0		2,861,524

-2,104,600 9/2
- 669,800 9/2
-0-

-25,124 9/27
-0-

-60,000 9/27
-0-

-42,000 9/27

3,287,624 Rec/NR Summ 9/25
312,400 Reclassion funds held in reserve for OEHE use
113,800 Rasc. funds held in reserve for OEHE use (Dir Emerg HC share)
2,861,524 Balance Available

-2,861,524
-0-

as of 9/27
Balance is zero

478

V Includes $482,788 for AMA and $108,288 for ACOG.

Dental
Reserve Funds

	Training	Advice Date	RPMS	Advice Date	Consultant Travel	Advice Date	Research	Advice Date	Recruitment	Advice Date	Printing	Advice Date	Technical Assistance	Advice Date	Dental Reserve Totals
Beginning Balance	$186,000		$38,000		$159,900		$46,000		$155,000		$77,000		$510,000		$1,171,900
Less: Proposed Tribal Shares Title III	(51,175)	3/13	(10,457)	3/13	(43,587)	3/13	(12,655)	3/13	(42,645)	3/13	(21,186)	3/13	(140,313)	3/13	($322,018)
Return/Additional Title III Funding	8,039	7/10	1,643	7/10	6,506	7/10	1,987	7/10	6,700	7/10	3,328	7/10	22,038	7/10	$50,241
Less: Tribal Shares Title I-Round I	(3,742)	6/13	(259)	6/13	(3,216)	6/13	(925)	6/13	(3,117)	6/13	(1,548)	6/13	0		($12,807)
Less: Tribal Shares Title I-Round II	(2,910)	8/5	(595)	8/5	(2,503)	8/5	(719)	8/5	(2,424)	8/5	(1,205)	8/5	(356)	8/5	($10,712)
Less: Pending Trbl Shrs Title I-Round III & IV	(5,904)	9/4	(1,207)	9/4	(5,076)	9/4	(1,460)	9/4	(4,920)	9/4	(2,444)	9/4	(762)	9/4	($21,773)
Revised Reserve Balance	130,308		27,125		112,024		32,228		108,594		53,945		390,607		854,831
	(5,066)	5/28	(19,943)	5/28	(10,000)	2/15	(24,145)	5/28	(80,000)	5/28	(40,414)	5/28	(64,400)	1/24	(243,968)
	(5,057)	5/28	(6,000)	7/17	(74,333)	5/28	(6,810)	8/15	(1,355)	5/28	(13,531)	8/15	(26,800)	2/8	(133,886)
	(122,973)	7/17	(311)	9/12	(27,027)	7/17			(27,239)	8/15			(22,800)	4/11	(200,350)
			(20)	9/17									(8,000)	4/19	(8,020)
													(78,000)	5/7	(78,000)
													75,000	5/23	75,000
													(40,667)	5/28	(40,667)
													(170,000)	5/28	(170,000)
													(30,855)	5/28	(30,855)
													(3,165)	5/28	(3,165)
													(20,920)	8/15	(20,920)
Balance Avail.	(2,788)		851		664		1,273		0		0		0		0

479

© Bal Rec/NR summ @ 9/18
Balance Available

Mental Health
Reserve Funds

	C.M.I. Grants	Advice Date	National Conference	Advice Date	Mental Health Reserve Totals
Beginning Balance	$600,000		$102,500		$702,500
Less: Proposed Tribal Shares Title III	(55,025)	3/13	(28,198)	3/13	($83,223)
Return/Additional Title III Funding	1,510	7/10	1,320	7/10	$2,830
Less: Tribal Shares Title I-Round I	(4,806)	6/13	(2,465)	6/13	($7,271)
Less: Tribal Shares Title I-Round II	(1,267)	8/5	(649)	8/5	($1,916)
Less: Pending Trbl Shrs Title I-Round III & I	(8,211)	9/4	(4,208)	9/4	($12,419)
Revised Reserve Balance	532,201		68,300		600,501
	(535,200)	7/24	(53,800)	5/21	(589,000)
			(9,775)	7/24	(9,775)
			(1,726)	9/12	(1,726)
	($2,999)		$2,999		$0 ✓

0 Bal Rec/NR summ @ 9/13
Balance Available

480

Alcohol/Substance Abuse
Reserve Funds

	Training	Advice Date	FAS/ CDC/ MOA	Advice Date	FAS Washington University	Advice Date	Information Systems	Advice Date	MOA/BIA & SAMSHA	Advice Date	Research/ Evaluation Project	Advice Date	RTC Adolescent Placement	Advice Date	Outpatient Treatment Initiative	Advice Date	Tele-Medicine Consultation	Advice Date	Wahpeton SU Support Services	Advice Date	New Tribes	Advice Date	Alcohol/ Sub. Abuse Reserve Totals
Beginning Balance	$559,111		$357,671		$131,138		$216,680		$150,000		$250,000		$80,000		$100,000		$100,000		$100,000		$150,000		$2,194,600
Less: Proposed Tribal Shares Title III	(153,819)	3/13	(98,402)	3/13	0		(59,613)	3/13	(41,271)	3/13	(68,781)	3/13	(22,009)	3/13	(27,512)	3/13	(27,512)	3/13	0		0		(498,919)
Return/Additional Title III Funding	(145,790)	7/10	(7,750)	7/10	0		24,301	7/10	23,781	7/10	68,781	7/10	22,009	7/10	(13,586)	7/10	(72,488)	7/10	0		(150,000)	7/10	(250,762)
Less: Tribal Shares Title I-Round I	(32,880)	6/13	(50,132)	6/13	0		(18,950)	6/13	(9,430)	6/13	(34,784)	6/13	(8,692)	6/13	(21,729)	6/13	0		0		0		(176,597)
Less: Tribal Shares Title I-Round II	(1,412)	8/5	(2,156)	8/5	0		(825)	8/5	(406)	8/5	(11,218)	8/5	(380)	8/5	(950)	8/5	0		0		0		(17,346)
Less: Pending Tribl Shrs Title I-Round III & IV	(12,251)	9/4	(15,550)	9/4	0		(4,126)	9/4	(2,031)	9/4	(95,190)	9/4	(4,512)	9/4	(4,761)	9/4	0		0		0		(138,421)
Revised Reserve Balance	212,959		183,682		131,138		157,467		120,623		108,808		66,418		31,462		0		100,000		0		1,112,555
	(210,000) (9,430)	7/1 7/1	(86,271) (35,000) (25,000) (27,000)	4/24 4/24 7/1 9/17	(131,138)	6/7	(80,000) (77,467)	7/1 8/28	(78,729) (20,570)	4/24 7/1	(105,000) (38,440)	7/1 8/28	(66,418)	8/28	(22,677)	8/28			(90,000)	7/1			(870,231) (180,907) (25,000) (27,000)
	(6,471)		10,411		0		0		21,324		(34,632)		0		8,785		0		10,000		0		9,417

-9,417 9/26
994

9,417 REC/NR Summ @ 9/23
Balance Available

-9417
-0- ✓

481

as of 9/27
Balance is zero

C
C
C
9,417.0000 +
PORT 4,000.0000 -
OK 753.0000 -
TBL ACT PLAN NAMS 2,000.0000 -
2,664.0000 -
HQW PB 0.0000 *

Public Health Nursing
Reserve Funds

	Preventive Health Initiative	Advice Date	Public Health Nursing Reserve Totals
Beginning Balance	$870,000		$870,000
Less: Proposed Tribal Shares Title III	(239,353)	3/13	(239,353)
Return/Additional Title III Funding	4,696	7/10	4,696
Less: Tribal Shares Title I-Round I	(32,024)	6/13	(32,024)
Less: Tribal Shares Title I-Round II	(5,511)	8/5	(5,511)
Less: Pending Trbl Shrs Title I-Round III & I	(35,716)	9/4	(35,716)
Revised Reserve Balance	562,092		562,092
	(308,800)	3/4	(308,800)
	(172,000)	7/17	(172,000)
	(30,500)	8/15	(30,500)
	(25,000)	8/28	(25,000)
	(25,000)	9/12	(25,000)
Balance Avail.	792		792
	-792	9/27	-792
	-0-		-0- ✓

792 Bal Rec/NP Summ @ 9/13
Balance Available

As of 9/27
Balance is Zero

Health Education
Reserve Funds

	HIV Prevention Initiative	Advice Date	Physical Fitness Initiative	Advice Date	Patient Education Demonstration Project	Advice Date	Networking & Advocacy	Advice Date	Strategic Planning Initiative	Advice Date	Health Education Reserve Totals
Beginning Balance	$535,000		$325,000		$90,000		$50,000		$81,700		$1,081,700
Less: Proposed Tribal Shares Title III	(147,187)	3/13	(89,415)	3/13	(24,759)	3/13	(13,759)	3/13	(22,477)	3/13	(297,597)
Return/Additional Title III Funding	3,169	7/10	1,930	7/10	530	7/10	297	7/10	483	7/10	6,409
Less: Tribal Shares Title I-Round I	(81,243)	6/13	(49,347)	6/13	(13,667)	6/13	(7,592)	6/13	(12,404)	6/13	(164,253)
Less: Tribal Shares Title I-Round II	(3,390)	8/5	(2,058)	8/5	(570)	8/5	(317)	8/5	(518)	8/5	(6,853)
Less: Pending Trbl Shrs Title I-Round III & IV	(21,964)	9/4	(13,342)	9/4	(3,695)	9/4	(2,054)	9/4	(3,354)	9/4	(44,409)
Revised Reserve Balance	284,385		172,768		47,839		26,575		43,430		574,997
	(1,200)	2/15	(85,000)	3/26	(2,200)	2/15	(5,000)	2/15	(10,650)	5/28	(104,050)
	(8,200)	2/15	(27,900)	7/10	(550)	2/15	(425)	2/15	(7,000)	6/7	(42,075)
	(1,075)	3/4			(30,000)	3/26	(1,675)	2/26	(350)	6/13	(33,100)
	(775)	3/21			(3,950)	4/24	(1,200)	3/4			(5,925)
	(203,000)	3/26					(16,500)	3/26			(219,500)
	(175,563)	4/24					(5,162)	4/24			(180,725)
							(900)	5/21			(900)
							(1,100)	9/4			(1,100)
							38,700	9/4			38,700
Balance Avail.	(103,428)		59,868		11,139		33,313		25,430		26,322
							-26,322	9/27			-26,392
							6,991				-0- ✓

26,322 Rec/NR Summ @ 9/23
Balance Available

as of 9/27
Balance is Zero

Community Health Representatives
Reserve Funds

	CHR Training Program	Advice Date	CHR Patient Care Component (PCC) Support	Advice Date	Traditional Health Care Practices Promotion	Advice Date	Uniband Contract	Advice Date	Technical Support (MOU w/OIRM)	Advice Date	CHR Reserve Totals
Beginning Balance	$1,105,400		$770,700		$128,500		$240,000		$52,500		$2,295,100
Less: Proposed Tribal Shares Title III	(304,115)	3/13	(212,037)	3/13	(34,806)	3/13	0		0		(550,958)
Return/Additional Title III Funding	2,167	7/10	2,778	7/10	91	7/10	0		0		5,036
Less: Tribal Shares Title I-Round I	(167,578)	6/13	(117,022)	6/13	(19,210)	6/13	0		0		(303,810)
Less: Tribal Shares Title I-Round II	(7,001)	8/5	(4,881)	8/5	(801)	8/5	0		0		(12,683)
Less: Pending Trbl Shrs Title I-Round III & IV	(42,447)	9/4	(31,645)	9/4	(5,194)	9/4	0		0		(79,286)
Revised Reserve Balance	586,426		407,893		66,580		240,000		52,500		1,353,399
	(600,000)	5/21	(275)	2/15	(10,200)	2/15	(94,121)	8/5	(25,000)	5/23	(729,596)
	(35,000)	5/23	(1,000)	3/21	(6,275)	2/26	(75,000)	8/15	(550)	8/28	(117,825)
			(68,500)	5/21	(3,100)	3/4	(8,075)	9/4	(25,000)	9/12	(104,675)
			(160,000)	5/21	(883)	4/11					(160,883)
			(77,200)	7/1	(3,612)	4/11					(80,812)
			(100,879)	8/5	(800)	4/24					(101,679)
					(27,100)	5/21					(27,100)
					(15,700)	5/21					(15,700)
					(10,000)	5/23					(10,000)
					(85)	3/21					(85)
					(5)	3/13					(5)
Balance Avail	(48,574)		39		(11,180)		62,804		1,950		5,039
							- 5,039 9/24				-5,039
							5,039 REC/NR Summ @ 9/23				-0- ✓
							Balance Available				

484

as of 9/27
Balance is Zero

Indian Health Professions
Reserve Funds

	Extern Funds	Advice Date	Scholarship Program Carryover (6/7)	Advice Date	IHP Reserve Totals
Beginning Balance	$294,800		$200,000		$494,800
	(193,300)	6/13	(90,000)	3/21	(283,300)
	(375)	7/24	(110,000)	6/7	(110,375)
	(190,380)	8/5			(190,380)
	100,000	8/5			100,000
	(10,745)	9/17			(10,745)
Balance Available	0		0		0 ✓

0 Rec-N/R Summ @ 9/18
Balance Available

Direct Operations
Reserve Funds

	OD Managed Funds	Advice Date	Direct Operations Reserve Totals
Beginning Balance	$277,000		$277,000
	(800)	6/13	(800)
Balance Avail.	276,200		276,200
	-276,200	9/27	276,200
	-0-		-0-
276,200	Bal Rec/NR Summ @ 9/18		
	Balance Available		

as of 9/27
Balance is zero

Contract Support Cost
Reserve Funds

	Compact Funds from Reserves	Advice Date	Regular Reserves	Advice Date	ISD Reserves	Advice Date	CSC Reserve Totals
Beginning Balance	$9,926,400		$373,900		$2,089,200		$12,389,500
	(2,099,500)	11/13 & 18	(8,095)	4/11	(639,869)	1/3	(2,747,464)
	(32,400)	12/29	(365,805)	8/5	(130,100)	6/13	(528,305)
	(37,900)	12/29			(1,319,231)	8/5	(1,357,131)
	(114,500)	12/29					(114,500)
	(72,500)	12/29					(72,500)
	(212,400)	12/29					(212,400)
	(35,000)	12/29					(35,000)
	(295,400)	12/29					(295,400)
	(320,000)	1/25					(320,000)
	(1,339,500)	2/12					(1,339,500)
	(703,788)	3/21					(703,788)
	173,854	3/21					173,854
	(1,444,442)	4/8					(1,444,442)
	(3,690,997)	4/8					(3,690,997)
	1,683,100	4/8					1,683,100
	198,900	4/9					198,900
	(123,000)	4/9					(123,000)
	(1,043,869)	8/15					(1,043,869)
	824,069	8/15					824,069
	(181,644)	8/15					(181,644)
	123,000	8/15					123,000
	(884,894)	9/12					(884,894)
	(102,111)	9/24					(102,111)
Balance Avail.	195,478		0		0		195,478

195,478 *Rec-N/R Summ @ 9/25*
Balance Available

Self-Governance
Reserve Funds

	Planning, Negotiation, & Travel	Advice Date	Shortfall	Advice Date	SG Reserve Totals
Beginning Balance	$1,600,800		$7,064,900		$8,665,700
	(800)	2/15	(11,036)	3/4	(11,836)
	(950)	2/26	(900,000)	3/13	(900,950)
	(2,709)	2/26	(51,151)	5/23	(53,860)
	(33,561)	3/4	(4,790,687)	9/21	(4,824,248)
	(15,160)	3/21	(25,868)	9/21	(41,028)
	(104,451)	4/24	(20,265)	9/21	(124,716)
	(70,000)	5/2	(55,259)	9/21	(125,259)
	(800)	5/28	(12,323)	9/21	(13,123)
	(208,799)	6/7	(9,027)	9/21	(217,826)
	(7,175)	6/7	(361,862)	9/21	(369,037)
	(3,270)	8/28	(762,522)	9/21	(765,792)
	(80,111)	9/4	(64,900)	9/25	(145,011)
	(1,743)	9/17			(1,743)
	(1,699)	9/21			(1,699)
	(1,069,572)	9/25			(1,069,572)
Balance Avail.	0		0		0 ✓

0 REC/NR Summ @ 9/25
Balance Available

Contract Health Care 6/7
Reserve Funds

	Quality Assurance	Advice Date	Deferred Services	Advice Date	CHS Reserve/ Undistributed 1/	Advice Date	Sub-Total CHS 6/7 Reserve Totals
Beginning Balance	$500,000		$2,000,000		$7,413,900		$9,913,900
Less: Proposed Tribal Shares Title III	0		0		(388,991)	3/13	(388,991)
Return/Additional Title III Funding	0		0		28,750	7/10	28,750
Less: Tribal Shares Title I-Round I	0		0		(20,161)	6/13	(20,161)
Less: Tribal Shares Title I-Round II	0		0		(22,121)	8/5	(22,121)
Less: Pending Trbl Shrs Title I-Round III & I	0		0		(44,878)	9/13	(44,878)
Revised Reserve Balance	500,000		2,000,000		6,966,499		9,466,499
	(391,500)	9/13	(1,411,560)	8/15	(1,932,000)	1/25	(3,735,060)
	(108,500)	9/13	(588,440)	8/15	(804,000)	2/9	(1,500,940)
			1,411,560	9/4	(25,000)	2/26	1,386,560
			588,440	9/4	(684,000)	4/15	(95,560)
			(2,000,000)	9/17	(2,580,000)	5/8	(4,580,000)
					(880,900)	8/15	(880,900)
					(300)	8/28	(300)
					6,645	9/23	6,645
					(28,674)	9/25	(28,674)
					(38,270)	9/25	(38,270)
Balance Avail	0		0		0		0

0 Rec-N/R Summ @ 9/25
Balance Available

[This Page Intentionally Left Blank]

Attachments 3-6 to Appellee's Supplemental Brief, filed April 24, 2003
[See JA Vol. I, PART 2 for Appellee's Supplemental Brief and Attachments 1-2]

DEPARTMENT OF HEALTH AND HUMAN SERVICES

FISCAL YEAR

1996

Volume XIII

PUBLIC HEALTH SERVICE
INDIAN HEALTH SERVICE

Justification of Estimates for Appropriations Committees

FY 1994 Crosswalk
Budget Authority
Estimated Distribution
($000)

Sub Sub Activity	Federal Indian Health Administration: Federal Clinical Services	Urban Health	Preventive Health	Indian Health Professions	Federal Administration	Self-Governance	Facilities	Total Federal Health Administration	Tribal Health Administration: Tribal Clinical Services	Tribal Preventive Health	Management Training	Self-Governance	Tribal Contract Support	Facilities	Total Tribal Health Administration	FY 1994 Total Approp
SERVICES																
Hospitals & Clinics	584,518	0	0	0	0	0	0	584,518	215,056	0	0	0	0	0	215,056	799,574
Dental Health	44,399	0	0	0	0	0	0	44,399	8,752	0	0	0	0	0	8,752	53,151
Mental Health	25,840	0	0	0	0	0	0	25,840	9,432	0	0	0	0	0	9,432	35,272
Alcohol & Substance Abuse	26,295	0	0	0	0	0	0	26,295	61,322	0	0	0	0	0	61,322	87,617
Contract Care	265,480	0	0	0	0	0	0	265,480	84,368	0	0	0	0	0	84,368	349,848
Subtotal (CS)	946,531	0	0	0	0	0	0	946,531	378,930	0	0	0	0	0	378,930	1,325,461
Public Health Nursing	0	0	18,260	0	0	0	0	18,260	0	3,927	0	0	0	0	3,927	22,187
Health Education	0	0	4,280	0	0	0	0	4,280	0	3,639	0	0	0	0	3,639	7,919
Community Health Representatives	0	0	1,133	0	0	0	0	1,133	0	41,877	0	0	0	0	41,877	43,010
Hep B/Haemophilus Influenzae Prog Alaska	0	0	1,213	0	0	0	0	1,213	0	135	0	0	0	0	135	1,348
Subtotal (PH)	0	0	24,886	0	0	0	0	24,886	0	49,578	0	0	0	0	49,578	74,464
Urban Health Projects	0	22,834	0	0	0	0	0	22,834	0	0	0	0	0	0	0	22,834
Indian Hlth Professions	0	0	0	27,406	0	0	0	27,406	0	0	0	0	0	0	0	27,406
Tribal Management	0	0	0	0	0	0	0	0	0	0	5,285	0	0	0	5,285	5,285
Direct Operations	0	0	0	0	49,471	0	0	49,471	0	0	0	0	0	0	0	49,471
Self Governance	0	0	0	0	0	1,049	0	1,049	0	0	0	3,931	0	0	3,931	4,980
Contract Support Costs	0	0	0	0	0	0	0	0	0	0	0	0	136,186	0	136,186	136,186
Total Services	946,531	22,834	24,886	27,406	49,471	1,049	0	1,072,178	378,930	49,578	5,285	3,931	136,186	0	573,910	1,646,088
FACILITIES																
Maintenance & Improvement	0	0	0	0	0	0	34,646	34,646	0	0	0	0	0	3,294	3,294	37,940
Sanitation Facilities:																
New/Reconstruct	0	0	0	0	0	0	40,433	40,433	0	0	0	0	0	0	0	40,433
Existing	0	0	0	0	0	0	44,618	44,618	0	0	0	0	0	0	0	44,618
Total Sanitation	0	0	0	0	0	0	85,051	85,051	0	0	0	0	0	0	0	85,051
Hlth Care Fac. Constr.	0	0	0	0	0	0	80,184	80,184	0	0	0	0	0	0	0	80,184
Facilities Support	0	0	0	0	0	0	38,215	38,215	0	0	0	0	0	0	0	38,215
Environmental Hlth Support	0	0	0	0	0	0	36,278	36,278	0	0	0	0	0	2,787	2,787	39,065
OEHA&S Support	0	0	0	0	0	0	10,073	10,073	0	0	0	0	0	0	0	10,073
Total Fac. & Env. Hlth Sup	0	0	0	0	0	0	84,566	84,566	0	0	0	0	0	2,787	2,787	87,353
Facilities Space	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5,917
Contract Support Costs	0	0	0	0	0	0	0	0	0	0	0	0	477	0	477	477
Total, Facilities	0	0	0	0	0	0	384,447	384,447	0	0	0	0	477	6,081	6,558	391,005
TOTAL IHS	946,531	22,834	24,886	27,406	49,471	1,049	384,447	1,256,625	378,930	49,578	5,285	3,931	136,663	6,081	580,468	1,943,870

SUP-8

INDIAN HEALTH SERVICE

Amounts Available for Obligation

FILE: G:\SS\DAM\8798\FY96\CBLI-HAS (File 8) 24-Jan-95

	FY 1994 Appropriation	FY 1995 Appropriation	FY 1996 Request
Appropriation (Services)	$1,645,877,000	$1,713,052,000	$1,816,350,000
Receipts and Reimbursements from:			
"Federal Funds"	14,250,000	16,083,000	16,217,000
"Trust Fund"	50,455,000	56,847,000	57,420,000
"Non-Federal Sources"	134,161,000	151,424,000	152,683,000
Subtotal	$198,866,000	$224,454,000	$226,320,000
Recovery of Prior Year Obligations	1,991,000	0	0
Unoblig. Balance Start of Year	43,781,000	59,050,000	0
Unoblig. Balance End of Year	(59,090,000)	0	0
Unoblig. Balance Lapsing	(7,727,000)	0	0
Total Amount Available for Obligation	$1,823,748,000	$1,996,556,000	$2,042,670,000

DEPARTMENT OF HEALTH AND HUMAN SERVICES

FISCAL YEAR
1997

PUBLIC HEALTH SERVICE
INDIAN HEALTH SERVICE

Justification of Estimates for Appropriations Committees

FY 1995 Crosswalk
Budget Authority
Estimated Distribution
($000)

Sub Sub Activity	Federal Indian Health Administration: Federal Clinical Services	Urban Health	Preventive Health	Indian Health Professions	Federal Administration	Self-Governance	Facilities	Total Federal Health Administration	Tribal Health Administration: Tribal Clinical Services	Tribal Preventive Health	Management Training	Self-Governance	Tribal Contract Support	Facilities	Total Tribal Health Administration	FY 1995 Actual
SERVICES																
Hospitals & Clinics	533,461	0	0	0	0	0	0	533,461	289,078	0	0	0	0	0	289,078	822,539
Dental Health	48,845	0	0	0	0	0	0	48,845	8,673	0	0	0	0	0	8,673	57,518
Mental Health	24,957	0	0	0	0	0	0	24,957	11,491	0	0	0	0	0	11,491	36,448
Alcohol & Substance Abuse	20,686	0	0	0	0	0	0	20,686	70,666	0	0	0	0	0	70,666	91,352
Contract Care	232,383	0	0	0	0	0	0	232,383	130,181	0	0	0	0	0	130,181	362,564
Subtotal (CS)	860,332	0	0	0	0	0	0	860,332	510,089	0 *	0	0	0	0	510,089	1,370,421
Public Health Nursing	0	0	18,133	0	0	0	0	18,133	0	5,372	0	0	0	0	5,372	23,505
Health Education	0	0	3,922	0	0	0	0	3,922	0	4,322	0	0	0	0	4,322	8,244
Community Health Representatives	0	0	870	0	0	0	0	870	0	43,065	0	0	0	0	43,065	43,935
Hep B/Haemophilus Influenzae Prog Alaska	0	0	1,006	0	0	0	0	1,006	0	322	0	0	0	0	322	1,328
Subtotal (PH)	0	0	23,931	0	0	0	0	23,931	0	53,101 *	0	0	0	0	53,101	77,032
Urban Health Projects	0	23,349	0	0	0	0	0	23,349	0	0	0	0	0	0	0	23,349
Indian Hlth Professions	0	0	0	27,479	0	0	0	27,479	0	0	0	0	0	0	0	27,479
Tribal Management	0	0	0	0	0	0	0	0	0	0	5,048	0	0	0	5,048	5,048
Direct Operations	0	0	0	0	45,588	0	0	45,588	0	0	4,121	0	0	0	4,121	49,709
Self Governance	0	0	0	0	0	424	0	424	0	0	0	8,170	0	0	8,170	8,594
Contract Support Costs	0	0	0	0	0	0	0	0	0	0	0	0	145,460	0	145,460	145,460
Total Services	860,332	23,349	23,931	27,479	45,588	424	0	981,103	510,089	53,101 *	9,169	8,170	145,460	0	725,989	1,707,092
FACILITIES																
Maintenance & Improvement	0	0	0	0	0	0	35,040	35,040	0	0	0	0	0	3,294	3,294	38,334
Sanitation Facilities																
New/Renovated	0	0	0	0	0	0	42,397	42,397	0	0	0	0	0	0	0	42,397
Existing	0	0	0	0	0	0	42,492	42,492	0	0	0	0	0	0	0	42,492
Total Sanitation	0	0	0	0	0	0	84,889	84,889	0	0	0	0	0	0	0	84,889
Hlth Care Fac Constr	0	0	0	0	0	0	27,822	27,822	0	0	0	0	0	0	0	27,822
Facilities Support	0	0	0	0	0	0	38,294	38,294	0	0	0	0	0	0	0	38,294
Environmental Hlth Support	0	0	0	0	0	0	37,527	37,527	0	0	0	0	0	2,787	2,787	40,314
OEH&F Support	0	0	0	0	0	0	9,872	9,872	0	0	0	0	0	0	0	9,872
Total Facs & Env Hlth Sup	0	0	0	0	0	0	85,693	85,693	0	0	0	0	0	2,787	2,787	88,480
Equipment	0	0	0	0	0	0	12,975	12,975	0	0	0	0	0	0	0	12,975
Contract Support Costs	0	0	0	0	0	0	0	0	0	0	0	0	482	0	482	482
Total, Facilities	0	0	0	0	0	0	0 246,419	246,419	0	0	0	0	482	6,081	6,563	252,981
TOTAL BIS	860,332	23,349	23,931	27,479	45,588	424	246,419	1,227,522	510,089	53,101	9,169	8,170	145,942	6,081	732,552	1,960,074

DEPARTMENT OF HEALTH AND HUMAN SERVICES
INDIAN HEALTH SERVICE
Indian Health Service Appropriation

Amounts Available for Obligations

FILE: O:\SS\DRH\BFPB\FY97\FAC-OBLI (File B) 14-Mar-96

	FY 1995 Appropriation	FY 1996 Policy 1/	FY 1997 Estimate
Appropriation (Services).....	$1,707,092,000	$1,747,842,000	$1,898,949,000
Receipts and Reimbursements from:			
"Federal Funds".....	34,000,000	34,000,000	35,000,000
"Non-Federal Sources".....	175,000,000	176,000,000	186,000,000
Subtotal.....	$209,000,000	$210,000,000	$221,000,000
Recovery of Prior Year Obligations.....	0	0	0
Unoblig. Balance Start of Year.....	59,000,000	55,000,000	55,000,000
Unoblig. Balance End of Year.....	55,000,000	55,000,000	55,000,000
Unoblig. Balance Lapsing.....	0	0	0
Total Amount Available for Obligation.....	$2,030,092,000	$2,067,842,000	$2,229,949,000

DEPARTMENT OF HEALTH AND HUMAN SERVICES

FISCAL YEAR
1998

Indian Health Service

Justification of Estimates for Appropriations Committees

FY 1996 Crosswalk
Budget Authority
Estimated Distribution
($000)

Sub-Sub Activity	Federal Indian Health Administration								Tribal Health Administration							
	Federal Clinical Services	Urban Health	Prev. Health	Indian Health Prof.	Federal Administration	Self-Gov.	Facilities	Total Federal Health Administration	Tribal Clinical Services	Tribal Prev. Health	Management Training	Self-Gov.	Tribal Contract Support	Facilities	Total Tribal Health Administration	FY 1996 Enacted
SERVICES																
Hospitals & Health Clinics	565,294	0	0	0	0	0	0	565,294	289,184	0	0	0	0	0	289,184	854,478
Dental Health	50,890	0	0	0	0	0	0	50,890	8,880	0	0	0	0	0	8,880	59,770
Mental Health	25,709	0	0	0	0	0	0	25,709	11,491	0	0	0	0	0	11,491	37,200
Alcohol & Substance Abuse	70,686	0	0	0	0	0	0	70,686	70,666	0	0	0	0	0	70,666	91,352
Contract Health Services	232,383	0	0	0	0	0	0	232,383	130,181	0	0	0	0	0	130,181	362,564
Subtotal (CS)	894,962	0	0	0	0	0	0	894,962	510,402	0	0	0	0	0	510,402	1,405,364
Public Health Nursing	0	0	18,778	0	0	0	0	18,778	0	5,372	0	0	0	0	5,372	24,150
Health Education	0	0	3,991	0	0	0	0	3,991	0	4,322	0	0	0	0	4,322	8,313
Community Hlth Repr.	0	0	870	0	0	0	0	870	0	43,083	0	0	0	0	43,083	43,953
Hep B/Haemophilus Influenzae Prog Alaska	0	0	1,006	0	0	0	0	1,006	0	322	0	0	0	0	322	1,328
Subtotal (PH)	0	0	24,645	0	0	0	0	24,645	0	53,101	0	0	0	0	53,101	77,746
Urban Health Projects	0	23,768	0	0	0	0	0	23,768	0	0	0	0	0	0	0	23,768
Indian Hlth Professions	0	0	0	26,244	0	0	0	26,244	0	0	0	0	0	0	0	26,244
Tribal Management	0	0	0	0	0	0	0	0	0	0	2,348	0	0	0	2,348	2,348
Direct Operations	0	0	0	0	43,588	0	0	43,588	0	0	4,121	0	0	0	4,121	47,709
Self Governance	0	0	0	0	0	473	0	473	0	0	0	8,617	0	0	8,617	9,090
Contract Support Costs	0	0	0	0	0	0	0	0	0	0	0	0	133,040	0	133,040	133,040
Total Services	894,962	23,768	24,645	26,244	43,588	473	0	1,013,680	510,402	53,101	6,469	8,617	133,040	0	731,629	1,745,809
FACILITIES																
Maintenance & Improvement	0	0	0	0	0	0	35,040	35,040	0	0	0	0	0	3,294	3,294	38,334
Sanitation Facilities:																
New/Renovated	0	0	0	0	0	0	42,397	42,397	0	0	0	0	0	0	0	42,397
Existing	0	0	0	0	0	0	42,492	42,492	0	0	0	0	0	0	0	42,492
Total Sanitation	0	0	0	0	0	0	84,889	84,889	0	0	0	0	0	0	0	84,889
Hlth Care Facs. Constr.	0	0	0	0	0	0	12,297	12,297	0	0	0	0	0	0	0	12,297
Facs. & Env. Hlth Sup																
Facilities Support	0	0	0	0	0	0	38,460	38,460	0	0	0	0	0	0	0	38,460
Environmental Hlth Support	0	0	0	0	0	0	37,858	37,858	0	0	0	0	0	2,787	2,787	40,645
OEH&E Support	0	0	0	0	0	0	10,572	10,572	0	0	0	0	0	0	0	10,572
Total Facs. & Env. Hlth Sup	0	0	0	0	0	0	86,890	86,890	0	0	0	0	0	2,787	2,787	89,677
Equipment	0	0	0	0	0	0	12,975	12,975	0	0	0	0	0	0	0	12,975
Contract Support Costs	0	0	0	0	0	0	0	0	0	0	0	0	482	0	482	482
Total, Facilities	0	0	0	0	0	0	232,091	232,091	0	0	0	0	482	6,081	6,563	238,654
TOTAL IHS	894,962	23,768	24,645	26,244	43,588	473	232,091	1,245,771	510,402	53,101	6,469	8,617	133,522	6,081	718,193	1,983,963

DEPARTMENT OF HEALTH AND HUMAN SERVICES
INDIAN HEALTH SERVICE
Indian Health Service Appropriation

Amounts Available for Obligations

FILE: O:\SS\OBM\BFPS\FY97\FAC-OBLI (File 8) 29-Jan-97

	FY 1996 Actual	FY 1997 Appropriation	FY 1998 Estimate
Appropriation (Services).....	$1,745,309,000	$1,806,269,000	$1,835,465,000
Receipts and Reimbursements from:			
"Federal Funds".....	60,000,000	64,000,000	64,000,000
"Non-Federal Sources".....	207,000,000	219,000,000	221,000,000
Subtotal.....	$267,000,000	$283,000,000	$285,000,000
Recovery of Prior Year Obligations...	0	0	0
Unoblig. Balance Start of Year.....	60,000,000	76,000,000	76,000,000
Unoblig. Balance End of Year.....	76,000,000	76,000,000	76,000,000
Unoblig. Balance Lapsing.....	0	0	0
Total Amount Available for Obligation.....	$2,148,309,000	$2,241,269,000	$2,272,465,000

PORTION AND PERCENTAGE OF IHS'S SERVICES APPROPRIATION NEITHER UNDER TRIBAL CONTRACT NOR EARMARKED IN APPROPRIATIONS ACTS

	Column 1	Column 2	Column 3	Column 4
Line 1	Fiscal Year	FY 1994	FY 1995	FY 1996
Line 2	Total IHS "Services" appropriation	**$1,646,088,000**[1]	**$1,707,092,000**[2]	**$1,745,809,000**[3]
Line 3	Total under tribal contract (including ISD Fund)	**$573,910,000**[4]	**$725,989,000**[5]	**$731,629,000**[6]
Line 4	Percent of appropriation under tribal contract (line 3 divided by line 2)	**34.9%**	**42.5%**	**41.9%**
Line 5	Balance of "Contract Medical Care" and "Indian Catastrophic Health Emergency Fund" not under tribal contract (earmarks less distribution to programs under tribal contract)	**$265,480,000**[7]	**$232,383,000**[8]	**$232,383,000**[9]
Line 6	"Section 108" Loan Repayment Program	**$11,526,000**	**$11,603,000**	**$11,306,000**
Line 7	Portion of appropriation neither under tribal contract nor earmarked in the appropriations act (line 1 less lines 3, 5 and 6)	**$795,172,000**	**$737,117,000**	**$770,491,000**
Line 8	Percent of appropriation neither under tribal contract nor earmarked in the appropriations act (line 7 divided by line 1)	**48.3%**	**43.2%**	**44.1%**
Line 9	Percent of appropriation under tribal contract and / or earmarked in the appropriations act (100% less line 8)	**51.7%**	**56.8%**	**55.9%**

ENDNOTES

1. FY96 IHS Budget Justification, p. IHS-108 (Supp. Add. 27) [column "FY 1994 Total Approp.", line "Total Services"].

2. FY97 IHS Budget Justification, p. IHS-121 (Supp. Add. 30) [column "FY 1995 Actual", line "Total Services"].

3. FY98 IHS Budget Justification, p. IHS-118 (Supp. Add. 33) [column "FY 1996 Enacted", line "Total Services"].

4. FY96 IHS Budget Justification, p. IHS-108 (Supp. Add. 27) [column "Total Tribal Health Administration", line "Total Services"].

5. FY97 IHS Budget Justification, p. IHS-121 (Supp. Add. 30) [column "Total Tribal Health Administration", line "Total Services"].

6. FY98 IHS Budget Justification, p. IHS-118 (Supp. Add. 33) [column "Total Tribal Health Administration", line "Total Services"].

7. $349,848,000 total for "Contract Medical" and "Catastrophic" earmarks (*see* Pub. L. 103-138, 107 Stat. 1379, 1408 (1993)), breaks down into:
   $265,480,000 (line 5 of the Chart) (*see* FY96 IHS Budget Justification, p. IHS-108 (Supp. Add. 27) [column "Total Federal Health Administration", line "Contract Care"]) and
   $84,368,000 (*id.* at [column "Total Tribal Health Administration", line "Contract Care"]) (this latter sum is already included in line 3 of the Chart).

8. $362,564,000 total for "Contract Medical" and "Catastrophic" earmarks (*see* Pub. L. 103-332, 108 Stat. 2499, 2528, 2538, § 313 (1994) ($363,258,000 starting earmarks and a .191% rescission)), breaks down into:
   $232,383,000 (line 5 of the Chart) (*see* FY97 IHS Budget Justification, p. IHS-121 (Supp. Add. 30) [column "Total Federal Health Administration", line "Contract Care"]) and
   $130,181,000 (*id.* at [column "Total Tribal Health Administration", line "Contract Care"]) (this latter sum is already included in line 3 of the Chart).

9. $362,564,000 total for two earmarks (*see* Pub. L. 104-134, 110 Stat. 1321-189 (1996)), breaks down into:
   $232,383,000 (line 5 of the Chart) (*see* FY98 IHS Budget Justification, p. IHS-118 (Supp. Add. 33) [column "Total Federal Health Administration", line "Contract Health Services"]) and
   $130,181,000 (*id.* at [column "Total Tribal Health Administration", line "Contract Health Services"]) (this latter sum is already included in line 3 of the Chart).

[This Page Intentionally Left Blank]

Addendum to Supplemental Brief of Appellant Tommy G. Thompson, filed Apr. 24, 2003
[See JA Vol. I, PART 2 for Supplemental Brief of Appellant Tommy G. Thompson]

ADDENDUM

Index

Congressional Appropriations and IHS Expenditures, Table 1– *FY 1994* 1a

SF 133 Report on Budget Execution, DHHS, IHS,
Period ended: 9/30/94(Account No. 75 4 0390) 2a

Congressional Appropriations and IHS Expenditures, Table 2 – *FY 1995* 3a

SF 133 Report on Budget Execution, DHHS, IHS,
Period ended: 9/30/95 (Account No. 75 5 0390) 4a

Congressional Appropriations and IHS Expenditures, Table 3 – *FY 1996* 5a

SF 133 Report on Budget Execution, DHHS, IHS,
Period ended: 9/30/96 (Account No. 75 6 0390) 6a

Declaration of John A. Thompson, executed April 21, 2003, ... 8a

Congressional Appropriations and IHS Expenditures

Table 1– *FY 1994*
Congress appropriated $1,645,877,000 for Indian Health Services.[1]
Of the $1,645,877,000, Congress earmarked $12,000,000 for the Catastrophic Health Emergency Fund to be available for obligation until expended, and $7,500,000 for the Indian Self-Determination (ISD) Fund, also available for obligation until expended.[2] These funds were put into IHS's "no-year" Treasury account (75 X 0390).[3]
Of the $1,645,877,000, Congress earmarked $337,848,000 for Contract Medical Care, to be available for obligation for two years.[4] These funds were put intoHS's "slash year" Treasury account (75 4/5 0390).
Of the $1,645,877,000, Congress earmarked no less than $11,526,000 for loan repayment, which was available for obligation for one year.[5]
After subtracting the earmarked funds, $1,277,003,000 remained available for obligation to fulfill all of IHS's other statutory duties until the close of the fiscal year.[6]
A total of $1,288,529,000 (the nonearmarked $1,277,003,000, plus the $11,526,000 for loan repayment) was put into IHS's "one-year" Treasury account for 1994 (75 4 0390).[7]
On November 8, 1994, HHS reported on SF 133 that the following transactions had been recorded and posted to the IHS accounting system for Account 75 4 0390 as of the close of the fiscal year on September 30, 1994: in addition to the $1,288,529,000, Account 75 4 0390 had received reimbursements and collections of $13,259,578.03 during fiscal year 1994, yielding total budgetary resources of $1,301,788,578.03. Of this amount, $1,294,947,188.02 had been recorded and posted as obligated, leaving an unobligated balance of $6,841,390.01.[8]

1. *See* Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993

2. *See* Pub. L. No. 103-138, 107 Stat. 1408.

3. *See* OMB Circular No. A-11, § 20.4 (2002).

4. *See* Pub. L. No. 103-138, 107 Stat. 1408.

5. *See* Pub. L. No. 103-138, 107 Stat. 1408.

6. *See* Pub. L. No. 103-138, 107 Stat. 1408

7. *See* OMB Circular No. A-11, § 20.4 (2002).

8. SF 133, Period ended: 9/30/94, Lines 1, 3A, 7, 8, 9A (*see infra* at 2a).

SF-133, OMB A-34 REPORT ON BUDGET EXECUTION	Sheet 13 of 77		
	Period ended: September 30, 1994		
Department of Health and Human Services			
Health Resources and Services Administration	Indian Health Service		
Description	7540390		
BUDGETARY RESOURCES			
1. Budget authority:			
A. Appropriations realized	1,288,529,000.00		
B. Appropriations anticipated (indefinite)			
C. Other new authority			
D. Net transfers (+ or -)			
2. Unob[illegible]ed [illegible]:			
[illegible] forward October			
B [illegible]ransfers (+ or -)			
3. Reimburseme[illegible] other income:			
A. Ear[illegible]	13,259,578.03		
B. Change in unfilled customers' orders(+or-)			
C. Anticipated for rest of year			
4. Recoveries of prior year obligations:			
A. Actual			
B. Anticipated for rest of year			
5. Portion not available pursuant to P.L.			
6. Restorations (+) and writeoffs (-)			
7. Total Budgetary Resources	1,301,788,578.03		
STATUS OF BUDGETARY RESOURCES			
8. Obligations incurred	1,294,947,188.02		
9. Unobligated balances available:			
A. Apportioned, category A	6,841,390.01		
B. Apportioned, category B	0.00		
C. Other balances available			
10. Unobligated balances not available:			
A. Apportioned for subsequent period*			
B. Withheld pending rescission*			
C. Deferred*			
D. Unapportioned balance of revolving fund*			
E. Other balances not available			
11. Total Budgetary Resources	1,301,788,578.03		
RELATION OF OBLIGATIONS TO OUTLAYS AND ACCRUED EXPENDITURES			
12. Obligations incurred, net (8-3A-3B-6A)	1,281,687,609.99		
13. Net unpaid obligations:			
A. Obligated balance, as of October 1	0.00		
B. Obligated balance transferred, net (+ or -)			
C. Obligated balance, end of period	296,388,162.75		
14. Outlays (12+13A+13B-13C)	985,299,447.24		
15. Change in accounts payable, net:			
A. Accounts payable, net, as of October 1	0.00		
B. Accounts payable transferred, net (+ or -)			
C. Accounts payable, net, and of period	(120,384,152.35)		
16. Accrued expenditures (14-15A-15B+15C)	864,915,294.89		

*From S.F. 132

John A Thompson — authorized officer

11/8/94 — date

BEST AVAILABLE COPY

Congressional Appropriations and IHS Expenditures

Table 2 – *FY 1995*
Congress appropriated $1,713,052,000 for Indian Health Services.[1] After a reduction and a rescission, the total amount appropriated was $1,707,092,071.[2]
Of the $1,707,092,071, Congress earmarked $11,977,080 for the Catastrophic Health Emergency Fund to be available for obligation until expended, and $7,485,675 for the ISD Fund, also available for obligation until expended.[3] These funds were put into Account 75 X 0390.
Of the $1,707,092,071, Congress earmarked $350,587,097 for Contract Medical Care, to be available for two years.[4] These funds were put into Account 75 5/6 0390.
Of the $1,707,092,071, Congress earmarked no less than $11,580,838 for loan repayment, which was available for obligation for one year.[5]
After subtracting the earmarked funds, $1,325,461,381 remained available for obligation to fulfill all of IHS's other statutory duties until the close of the fiscal year.[6]
A total of $1,337,042,219 (the nonearmarked $1,325,461,381, plus the $11,580,838 for loan repayment) was made available in Account 75 5 0390 (the one year account).
On November 13, 1995, HHS reported on SF 133 that the following transactions had been recorded and posted to the IHS accounting system for account 75 5 0390 as of the close of the fiscal year on September 30, 1995: In addition to the $1,337,042,219, Account 75 5 0390 had received reimbursements and collections of $13,170,900, yielding total budgetary resources of $1,350,213,118.25. Of this amount, $1,346,967,572.54 had been recorded and posted as obligated, leaving an unobligated balance of $3,245,545.71($3,128,645.71, plus $116,900.00).[7]

1. Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2527-28 (1994).

2. *See* Pub. L. No. 103-332, 108 Stat. 2537, 2538, § 313; Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy That Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, 109 Stat. 194, 248, § 2007(a) (1995).

3. *See* Pub. L. No. 103-332, 108 Stat. 2528; Pub. L. No. 104-19, 109 Stat. 248, § 2007(a).

4. *See* Pub. L. No. 103-332, 108 Stat. 2528; Pub. L. No. 104-19, 109 Stat. 248, § 2007(a).

5. *See* Pub. L. No. 103-332, 108 Stat. 2528, Pub. L. No. 104-19, 109 Stat. 248, § 2007(a).

6. *See* Pub. L. No. 103-332, 108 Stat. 2528.

7. SF 133, Period ended: 9/30/95, Lines 1, 3A, 5, 7, 8, 9A, 9B (*see infra*, at 4a).

SF-133, OMB A-34 REPORT ON BUDGET EXECUTION Sheet 29 of 92
Period ended: September 30, 1995

Department of Health and Human Services
Health Resources and Services Administration

Description	Indian Health Service 7560390		FINAL
BUDGETARY RESOURCES			
1. Budget authority:			
A. Appropriations realized....P.L. 103-332/104-19	1,339,696,0[illegible]		
B. Appropriations anticipated (indefinite.....			
C. Other new autho.....			
D. Net transfers (+ or -)			
2. Unobligated balance:			
A. Brought forward October 1994 ACTUAL.....			
B. Net transfers (+ or -)			
3. Reimbursements and other income:			
A. Earned.....	13,170,900.25		
B. Change in unfilled customers' orders(+or-)			
C. Anticipated for rest of year			
4. Recoveries of prior year obligations:			
A. Actual.....			
B. Anticipated for rest of year			
5. Portion not available pursuant to P.L. 103-332.....	(2,563,782.00)		
6. Restorations (+) and writeoffs (-)			
7. Total Budgetary Resources	1,350,213,118.25		
STATUS OF BUDGETARY RESOURCES			
8. Obligations incurred	1,346,967,572.54		
9. Unobligated balances available:			
A. Apportioned, category A	3,128,645.71		
B. Apportioned, category B	116,900.00		
C. Other balances available.....			
10. Unobligated balances not available:			
A. Apportioned for subsequent periods*			
B. Withheld pending rescission*			
C. Deferr.....			
D. Unapportioned balance of revolving fund*.....			
E. Other balances not available			
11. Total Budgetary Resourc.....	1,350,213,118.25		
RELATION OF OBLIGATIONS TO OUTLAYS AND ACCRUED EXPENDITURES			
12. Obligations incurred, net(8-3A-3B-4A).....	1,333,796,672.29		
13. Net unpaid obligations:			
A. Obligated balance, as of October 1	0.00		
B. Obligated balance transferred,net(+ or -)			
C. Obligated balance, end of period.....	259,488,263.00		
14. Outlays (12+13A+13B-13C)	1,074,308,409.29		
15. Change in accounts payable, net:			
A. Accounts payable, net, as of October 1...	0.00		
B. Accounts payable transferred, net (+ or -)			
C. Accounts payable, net, end of period	(133,403,418.69)		
16. Accrued expenditures (14-15A-15B+15C).....	940,904,990.60		

*From S.F. 132

John A. Thompson — authorized officer
11/13/95 — date

Congressional Appropriations and IHS Expenditures

Table 3 – *FY 1996*
Congress appropriated $1,747,842,000 for Indian Health Services.[1] After a rescission, the total appropriation was $1,745,309,000.[2]
Of the $1,745,309,000, Congress earmarked $12,000,000 for the Catastrophic Health Emergency Fund to be available for obligation until expended, and $7,500,000 for the ISD Fund, which was also available for obligation until expended.[3] These funds were put into Account 75 X 0390.
Of the $1,745,309,000, Congress earmarked $350,564,000 for Contract Medical Care, to be available for two years.[4] These funds were put into Account 75 6/7 0390.
Of the $1,745,309,000, Congress earmarked no less than $11,306,000 for loan repayment, which was available for obligation for one year.[5]
After subtracting the earmarked funds, $1,363,939,000 remained available for obligation to fulfill all of IHS's other statutory duties until the close of the fiscal year.[6]
A total of $1,375,245,000 (the nonearmarked $1,363,939,000, plus the $11,306,000 for loan repayment) was put into Account 75 6 0390 (the one year account).
On November 15, 1996, HHS reported on SF 133 that the following transactions had been recorded and posted to the Indian Health Service accounting system for account 75 6 0390 as of the close of the fiscal year on September 30, 1996: in addition to the $1,375,245,000 appropriated by Congress, Account 75 6 0390 had received reimbursements and collections of $12,975,011, and had $514,516.62 receivable from federal sources, for total budgetary resources of $1,388,734,527.97. Of this amount, $1,363,188,676.22 had been recorded and posted as obligated, leaving an unobligated balance of $1,253,280.64.[7]

1. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996).

2. *See* Pub. L. No. 104-134, 110 Stat.1321-380, § 31002(a).

3. *See* Pub. L. No. 104-134, 110 Stat.1321-189.

4. *See* Pub. L. No. 104-134, 110 Stat. 1321-189.

5. *See* Pub. L. No. 104-134, 110 Stat.1321-189.

6. *See* Pub. L. No. 104-134, 110 Stat. 1321-189.

7. SF 133, Period ended 9/30/96, Lines 1, 3A, 7, 8A, 9A (see *infra*, at 6a-7a).

SF 133 REPORT ON BUDGET EXECUTION

Department of Health and Human Services Indian Health Service	Sheet 29a of 90 Period ended: 09/30/96	FINAL
DESCRIPTION	7560390	
BUDGETARY RESOURCES		
1. Budget authority:		
A. Appropriations	1,375,245,000.00	
B. Borrowing authority		
C. Contract authority		
D. Net transfers, CY authority (+ or -)		
E. Other		
2. Unobligated balance:		
A. Brought forward October 1		
B. Net transfers PY balance, actual (+ or -)		
C. Anticipated transfer PY balance (+ or -)		
3. Spending authority from offsetting collections (gross):		
A. Earned:		
1. Collected	12,975,011.35	
2. Receivable from Federal sources	514,516.62	
B. Change in unfilled customer orders(+ or -):		
1. Advance received		
2. Without advance from Federal sources		
C. Anticipated for rest of year:		
1. Advance for anticipated orders		
2. Without advance		
D. Transfers from trust funds:		
1. Collected		
2. Anticipated		
4. Recoveries of prior year obligations:		
A. Actual		
B. Anticipated		
5. Temporarily not available pursuant to P.L. _____(-)		
6. Permanently not available:		
A. Cancellations of expired and no-year accounts(-)		
B. Enacted rescissions of PY balances(-)		
C. Capital transfer and redemption of debt(-)		
D. Other authority withdrawn(-)		
E. Pursuant to Public Law _____(-)		
F. Anticipated for rest of year		
7. TOTAL BUDGETARY RESOURCES	1,388,734,527.97	

Department of Health and Human Services Indian Health Service	Sheet 29b of 90 Period ended: 09/30/96		
DESCRIPTION	7560390		
STATUS OF BUDGETARY RESOURCES			
8. Obligations incurred:			
A. Category A, direct obligations	1,363,188,676.22		
B. Category B, direct obligations:			
1. Loan Repayment	11,388,615.74		
C. Not subject to apportionment			
D. Reimbursable obligations	12,903,955.37		
9. Unobligated balance:			
A. Apportioned:			
1. Balance currently available	1,253,280.64		
2. Anticipated			
B. Exempt from apportionment			
C. Other available			
10. Unobligated balances not available:			
A. Apportioned for subsequent periods	0.00		
B. Deferred			
C. Withheld pending recession			
D. Other			
11. TOTAL BUDGETARY RESOURCES	1,388,734,527.97		
RELATION OF OBLIGATIONS TO OUTLAYS			
12. Obligation balance, net as of October 1	0.00		
13. Obligated balance transferred, net(+ or -)			
14. Obligated balance, net, end of period:			
A. Accounts receivable(-)	(261,768,769.22)		
B. Unfilled customer orders(-)			
1. Federal sources without advance			
2. Federal sources with advance			
3. Non-Federal sources with advance			
C. Undelivered orders(+)	421,895,599.01		
D. Accounts payable(+)	52,611,418.33		
15. Outlays:			
A. Disbursements(+)	1,174,228,490.59		
B. Collections(-)	(12,975,011.35)		

Public Law 104-91,99

John A Thompson 11/15/96

(Authorized Officer) (Date)

Preparer: Jean C. Holmes
Address: 5600 Fishers Ln., Rm. 16A12
Rockville, MD 20857
Phone: (301) 443-5423

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 02-1286

TOMMY G. THOMPSON, Secretary of Health and Human Services,

Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,

Appellee.

APPEAL FROM THE DEPARTMENT OF INTERIOR
BOARD OF CONTRACT APPEALS IN NOS. 3877-3879/89
ADMINISTRATIVE JUDGE BERNARD V. PARRETTE

DECLARATION OF JOHN A. THOMPSON

I, John A. Thompson, declare as follows:

1. I am currently employed as the Chief of the Reports and Control Branch of the Division of Financial Operations of the Program Support Center ("PSC") of the U.S. Department of Health and Human Services ("HHS"). I have been in this position since 1994. In my current position as the Chief of the Reports and Control Branch, I am responsible for preparing consolidated financial reports

to the U.S. Department of the Treasury (hereinafter referred to as "Treasury") and the Office of Management and Budget ("OMB") on behalf of various HHS operating divisions, including the Indian Health Service ("IHS"). The IHS reports are prepared using data as it is provided to me by IHS, which incorporates transactions made by nine IHS area financial offices, the HHS Central Payroll Office, the Division of Payment Management, and the Division of Financial Operations (called the Division of Fiscal Services during fiscal years 1994 through 1996) using various accounting feeder systems.

2. One of the reports prepared by my office is the Report on Budget Execution, Standard Form 133 (SF 133). These reports are prepared by my staff and reviewed by me in the ordinary course of my duties.

3. I have examined the documents attached as Exhibit A to this declaration and they are authentic copies of SF 133s prepared by my staff and signed by me for the periods ending 9/30/94, 11/30/94, 9/30/95, 12/31/95, 9/30/96, and 3/31/97.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on : 4/21/03

John A. Thompson
JOHN A. THOMPSON

EXHIBIT A

SF-133, OMB A-34 REPORT ON BUDGET EXECUTION Sheet 13 of 77
Period ended: September 30, 1994

Department of Health and Human Services
Health Resources and Services Administration — Indian Health Service — 7540390

Description			
BUDGETARY RESOURCES			
1. Budget authority:			
A. Appropriations realized	1,288,529,000.00		
B. Appropriations anticipated (indefinite)			
C. Other new authority			
D. Net transfers (+ or -)			
2. Unobligated balance:			
A. Brought forward October			
B. Net transfers (+ or -)			
3. Reimbursements and other income:			
A. Earned	13,259,578.03		
B. Change in unfilled customers' orders(+or-)			
C. Anticipated for rest of year			
4. Recoveries of prior year obligations:			
A. Actual			
B. Anticipated for rest of year			
5. Portion not available pursuant to P.L.			
6. Restorations (+) and writeoffs (-)			
7. Total Budgetary Resources	1,301,788,578.03		
STATUS OF BUDGETARY RESOURCES			
8. Obligations incurred	1,294,947,188.02		
9. Unobligated balances available:			
A. Apportioned, category A	6,841,390.01		
B. Apportioned, category B	0.00		
C. Other balances available			
10. Unobligated balances not available:			
A. Apportioned for subsequent period*			
B. Withheld pending rescission*			
C. Deferred*			
D. Unapportioned balance of revolving fund*			
E. Other balances not available			
11. Total Budgetary Resources	1,301,788,578.03		
RELATION OF OBLIGATIONS TO OUTLAYS AND ACCRUED EXPENDITURES			
12. Obligations incurred, net(8-3A-3B-6A)	1,281,687,609.99		
13. Net unpaid obligations:			
A. Obligated balance, as of October 1	0.00		
B. Obligated balance transferred,net(+ or -)			
C. Obligated balance, end of period	296,388,162.75		
14. Outlays (12+13A+13B-13C)	985,299,447.24		
15. Change in accounts payable, net:			
A. Accounts payable, net, as of October 1	0.00		
B. Accounts payable transferred, net (+ or -)			
C. Accounts payable, net, end of period	(120,384,152.35)		
16. Accrued expenditures (14-15A-15B+15C)	864,915,294.89		

*From S.F. 132

John A Thompson — Authorized officer — 11/8/94 — date

-12a-

SF-133, OMB A-34 REPORT ON BUDGET EXECUTION Sheet 30 of 90
Period ended: November 30, 1994

Department of Health and Human Services
Health Resources and Services Administration — Indian Health Service — 7540390

Description			
BUDGETARY RESOURCES			
1. Budget authority:			
A. Appropriations realized			
B. Appropriations anticipated (indefinite)			
C. Other new authority			
D. Net transfers (+ or -)			
2. Unobligated balance:			
A. Brought forward October 1994 ACTUAL	6,841,390		
B. Net transfers (+ or -)	(200,000) A/		
3. Reimbursements and other income:			
A. Earned			
B. Change in unfilled customers' orders(+or-)			
C. Anticipated for rest of year			
4. Recoveries of prior year obligations:			
A. Actual			
B. Anticipated for rest of year			
5. Portion not available pursuant to P.L.			
6. Restorations (+) and writeoffs (-)			
7. Total Budgetary Resources	6,641,390		
STATUS OF BUDGETARY RESOURCES			
8. Obligations incurred	2,465,530		
9. Unobligated balances available:			
A. Apportioned, category A			
B. Apportioned, category B			
C. Other balances available			
10. Unobligated balances not available:			
A. Apportioned for subsequent period*			
B. Withheld pending rescission*			
C. Deferred*			
D. Unapportioned balance of revolving fund*			
E. Other balances not available	4,175,860		
11. Total Budgetary Resources	6,641,390		
RELATION OF OBLIGATIONS TO OUTLAYS AND ACCRUED EXPENDITURES			
12. Obligations incurred, net(8-3A-3B-6A)	2,465,530		
13. Net unpaid obligations:			
A. Obligated balance, as of October 1	296,388,163		
B. Obligated balance transferred,net(+ or -)			
C. Obligated balance, end of period	179,907,645		
14. Outlays (12+13A+13B-13C)	118,946,048		
15. Change in accounts payable, net:			
A. Accounts payable, net, as of October 1	(120,384,152)		
B. Accounts payable transferred, net (+ or -)			
C. Accounts payable, net, end of period	(156,072,157)		
16. Accrued expenditures (14-15A-15B+15C)	83,288,044		

Indian Health Professions Scholarships transferred from unobligated balance to 75 4/50390.

John A Thompson — Authorized officer — 1/18/95 — date

-13a-

SF-133, OMB A-34 REPORT ON BUDGET EXECUTION Sheet 29 of 92
Period ended: September 30, 1995

Department of Health and Human Services
Health Resources and Services Administration

Description	Indian Health Service 7550390		FINAL
BUDGETARY RESOURCES			
1. Budget authority:			
A. Appropriations realized....P.L. 103-333/104-19	1,339,606,000.00		
B. Appropriations anticipated (indefinite.....			
C. Other new autho.....			
D. Net transfers (+ or -)			
2. Unobligated balance:			
A. Brought forward October 1994 ACTUAL.....			
B. Net transfers (+ or -)			
3. Reimbursements and other income:			
A. Earned.....	13,170,900.25		
B. Change in unfilled customers' orders(+or-)			
C. Anticipated for rest of year			
4. Recoveries of prior year obligations:			
A. Actual.....			
B. Anticipated for rest of year			
5. Portion not available pursuant to P.L. 103-333.....	(2,563,782.00)		
6. Restorations (+) and writeoffs (-)			
7. Total Budgetary Resources	1,350,213,118.25		
STATUS OF BUDGETARY RESOURCES			
8. Obligations incurred	1,346,967,572.54		
9. Unobligated balances available:			
A. Apportioned, category A	3,128,645.71		
B. Apportioned, category B	116,900.00		
C. Other balances available.....			
10. Unobligated balances not available:			
A. Apportioned for subsequent periods*			
B. Withheld pending rescission*			
C. Deferr.....			
D. Unapportioned balance of revolving fund*.....			
E. Other balances not available			
11. Total Budgetary Resourc.....	1,350,213,118.25		
RELATION OF OBLIGATIONS TO OUTLAYS AND ACCRUED EXPENDITURES			
12. Obligations incurred, net(8-3A-3B-4A).....	1,333,796,672.29		
13. Net unpaid obligations:			
A. Obligated balance, as of October 1	0.00		
B. Obligated balance transferred,net(+ or -)			
C. Obligated balance, end of period.....	259,488,263.00		
14. Outlays (12+13A+13B-13C)	1,074,308,409.29		
15. Change in accounts payable, net:			
A. Accounts payable, net, as of October 1...	0.00		
B. Accounts payable transferred, net (+ or -)			
C. Accounts payable, net, end of period	(133,403,418.69)		
16. Accrued expenditures (14-15A-15B+15C).....	940,904,990.60		

*From S.F. 132

John A. Thompson — authorized officer — 11/13/95 — date

SF-133, OMB A-34 REPORT ON BUDGET EXECUTION Sheet 30 of 91
Period ended: December 31, 1995

Department of Health and Human Services
Health Resources and Services Administration

Description	Indian Health Service 7550390		
BUDGETARY RESOURCES			
1. Budget authority:			
A. Appropriations realized.....			
B. Appropriations anticipated (indefinite.....			
C. Other new autho.....			
D. Net transfers (+ or -)			
2. Unobligated balance:			
A. Brought forward October 1995 ACTUAL.....	3,245,546		
B. Net transfers (+ or -)	(200,000)	A/	
3. Reimbursements and other income:			
A. Earned.....			
B. Change in unfilled customers' orders(+or-)			
C. Anticipated for rest of year			
4. Recoveries of prior year obligations:			
A. Actual.....			
B. Anticipated for rest of year			
5. Portion not available pursuant to P.L.....			
6. Restorations (+) and writeoffs (-)			
7. Total Budgetary Resources	3,045,546		
STATUS OF BUDGETARY RESOURCES			
8. Obligations incurred	2,444,695		
9. Unobligated balances available:			
A. Apportioned, category A			
B. Apportioned, category B			
C. Other balances available.....			
10. Unobligated balances not available:			
A. Apportioned for subsequent periods*			
B. Withheld pending rescission*			
C. Deferr.....			
D. Unapportioned balance of revolving fund*.....			
E. Other balances not available	600,851		
11. Total Budgetary Resourc.....	3,045,546		
RELATION OF OBLIGATIONS TO OUTLAYS AND ACCRUED EXPENDITURES			
12. Obligations incurred, net(8-3A-3B-4A).....	2,444,695		
13. Net unpaid obligations:			
A. Obligated balance, as of October 1	259,488,263		
B. Obligated balance transferred,net(+ or -)			
C. Obligated balance, end of period.....	131,795,183		
14. Outlays (13+13A+13B-13C)	130,137,854		
15. Change in accounts payable, net:			
A. Accounts payable, net, as of October 1...	(133,683,419)		
B. Accounts payable transferred, net (+ or -)			
C. Accounts payable, net, end of period	(231,583,357)		
16. Accrued expenditures (14-15A-15B+15C).....	31,957,916		

Indian Health Professions Scholarships transferred from unobligated balance to 755/60390.

John A. Thompson — authorized officer — 1/31/96 — date

97-133, OMB A-34 REPORT ON BUDGET EXECUTION Sheet 29 of 92
Period ended: September 30, 1995

Department of Health and Human Services
Health Resources and Services Administration

Description	Indian Health Service 7550390		FINAL
BUDGETARY RESOURCES			
1. Budget authority:			
A. Appropriations realised....P.L. 103-332/104-19	1,339,684,000.00		
B. Appropriations anticipated (indefinite.....			
C. Other new autho.....		-	
D. Net transfers (+ or -)			
2. Unobligated balance:			
A. Brought forward October 1994 ACTUAL.....			
B. Net transfers (+ or -)			
3. Reimbursements and other income:			
A. Earned.....	13,170,900.25		
B. Change in unfilled customers' orders(+or-)			
C. Anticipated for rest of year			
4. Recoveries of prior year obligations:			
A. Actual.....			
B. Anticipated for rest of year			
5. Portion not available pursuant to P.L. 103-332.....	(2,563,782.00)		
6. Restorations (+) and writeoffs (-)			
7. Total Budgetary Resources	1,350,213,118.25		
STATUS OF BUDGETARY RESOURCES			
8. Obligations incurred	1,346,967,572.54		
9. Unobligated balances available:			
A. Apportioned, category A	3,128,645.71		
B. Apportioned, category B	116,900.00		
C. Other balances available.....			
10. Unobligated balances not available:			
A. Apportioned for subsequent periods*			
B. Withheld pending rescission*			
C. Deferr.....			
D. Unapportioned balance of revolving fund*.....			
E. Other balances not available			
11. Total Budgetary Resourc.....	1,350,213,118.25		
RELATION OF OBLIGATIONS TO OUTLAYS AND ACCRUED EXPENDITURES			
12. Obligations incurred, net(8-1A-1B-4A).....	1,333,796,672.29		
13. Net unpaid obligations:			
A. Obligated balance, as of October 1	0.00		
B. Obligated balance transferred,net(+ or -)			
C. Obligated balance, end of period.....	259,488,263.00		
14. Outlays (12+13A+13B-13C)	1,074,308,409.29		
15. Change in accounts payable, net:			
A. Accounts payable, net, as of October 1...	0.00		
B. Accounts payable transferred, net (+ or -)			
C. Accounts payable, net, end of period	(133,403,418.69)		
16. Accrued expenditures (14-15A-15B+15C).....	940,904,990.60		

*From S.F. 132

John A Thompson — authorised officer — 11/13/95 — date

97-133, OMB A-34 REPORT ON BUDGET EXECUTION Sheet 30 of 91
Period ended: December 31, 1995

Department of Health and Human Services
Health Resources and Services Administration

Description	Indian Health Service 7550390		
BUDGETARY RESOURCES			
1. Budget authority:			
A. Appropriations realised.....			
B. Appropriations anticipated (indefinite.....			
C. Other new autho.....			
D. Net transfers (+ or -)			
2. Unobligated balance:			
A. Brought forward October 1995 ACTUAL.....	3,245,546		
B. Net transfers (+ or -)	(200,000) A/		
3. Reimbursements and other income:			
A. Earned.....			
B. Change in unfilled customers' orders(+or-)			
C. Anticipated for rest of year			
4. Recoveries of prior year obligations:			
A. Actual.....			
B. Anticipated for rest of year			
5. Portion not available pursuant to P.L.....			
6. Restorations (+) and writeoffs (-)			
7. Total Budgetary Resources	3,045,546		
STATUS OF BUDGETARY RESOURCES			
8. Obligations incurred	2,444,695		
9. Unobligated balances available:			
A. Apportioned, category A			
B. Apportioned, category B			
C. Other balances available.....			
10. Unobligated balances not available:			
A. Apportioned for subsequent periods*			
B. Withheld pending rescission*			
C. Deferr.....			
D. Unapportioned balance of revolving fund*.....			
E. Other balances not available	600,851		
11. Total Budgetary Resourc.....	3,045,546		
RELATION OF OBLIGATIONS TO OUTLAYS AND ACCRUED EXPENDITURES			
12. Obligations incurred, net(8-1A-1B-4A).....	2,444,695		
13. Net unpaid obligations:			
A. Obligated balance, as of October 1	259,488,263		
B. Obligated balance transferred,net(+ or -)			
C. Obligated balance, end of period.....	131,795,183		
14. Outlays (12+13A+13B-13C)	130,137,854		
15. Change in accounts payable, net:			
A. Accounts payable, net, as of October 1...	(133,403,419)		
B. Accounts payable transferred, net (+ or -)			
C. Accounts payable, net, end of period	(231,583,387)		
16. Accrued expenditures (14-15A-15B+15C).....	31,957,916		

Indian Health Professions Scholarships transferred from unobligated balance to 755/60390.

John A Thompson — authorised officer — 1/31/96 — date

SF 133 REPORT ON BUDGET EXECUTION

Department of Health and Human Services Indian Health Service	Sheet 29a of 90 Period ended: 09/30/96 FINAL
DESCRIPTION	7560390
BUDGETARY RESOURCES	
1. Budget authority:	
A. Appropriations	1,375,245,000.00
B. Borrowing authority	
C. Contract authority	
D. Net transfers, CY authority (+ or -)	
E. Other	
2. Unobligated balance:	
A. Brought forward October 1	
B. Net transfers PY balance, actual (+ or -)	
C. Anticipated transfer PY balance (+ or -)	
3. Spending authority from offsetting collections (gross):	
A. Earned:	
1. Collected	12,975,011.35
2. Receivable from Federal sources	514,516.62
B. Change in unfilled customer orders(+ or -):	
1. Advance received	
2. Without advance from Federal sources	
C. Anticipated for rest of year:	
1. Advance for anticipated orders	
2. Without advance	
D. Transfers from trust funds:	
1. Collected	
2. Anticipated	
4. Recoveries of prior year obligations:	
A. Actual	
B. Anticipated	
5. Temporarily not available pursuant to P.L. _____(-)	
6. Permanently not available:	
A. Cancellations of expired and no-year accounts(-)	
B. Enacted rescissions of PY balances(-)	
C. Capital transfer and redemption of debt(-)	
D. Other authority withdrawn(-)	
E. Pursuant to Public Law _____(-)	
F. Anticipated for rest of year	
7. TOTAL BUDGETARY RESOURCES	1,388,734,527.97

Department of Health and Human Services Indian Health Service	Sheet 29b of 90 Period ended: 09/30/96
DESCRIPTION	7560390
STATUS OF BUDGETARY RESOURCES	
8. Obligations incurred:	
A. Category A, direct obligations	1,363,188,676.22
B. Category B, direct obligations:	
1. Loan Repayment	11,388,615.74
C. Not subject to apportionment	
D. Reimbursable obligations	12,903,955.37
9. Unobligated balance:	
A. Apportioned:	
1. Balance currently available	1,253,280.64
2. Anticipated	
B. Exempt from apportionment	
C. Other available	
10. Unobligated balances not available:	
A. Apportioned for subsequent periods	0.00
B. Deferred	
C. Withheld pending recession	
D. Other	
11. TOTAL BUDGETARY RESOURCES	1,388,734,527.97
RELATION OF OBLIGATIONS TO OUTLAYS	
12. Obligation balance, net as of October 1	0.00
13. Obligated balance transferred, net(+ or -)	
14. Obligated balance, net, end of period:	
A. Accounts receivable(-)	(261,768,769.22)
B. Unfilled customer orders(-)	
1. Federal sources without advance	
2. Federal sources with advance	
3. Non-Federal sources with advance	
C. Undelivered orders(+)	421,895,599.01
D. Accounts payable(+)	52,611,410.33
15. Outlays:	
A. Disbursements(+)	1,174,238,490.59
B. Collections(-)	(12,975,011.35)

Public Law 104-91,99

John A Thompson 11/15/96

(Authorized Officer) (Date)

Preparer: Jean C. Holmes
Address: 5600 Fishers Ln., Rm. 16A12
Rockville, MD 20857
Phone: (301) 443-5623

SF 133 REPORT ON BUDGET EXECUTION

Department of Health and Human Services Indian Health Service	Sheet 31a of 87 Period ended: 03/31/97	
DESCRIPTION	7560390	
BUDGETARY RESOURCES		
1. Budget authority:		
A. Appropriations		
B. Borrowing authority		
C. Contract authority		
D. Net transfers, CY authority (+ or -)		
E. Other		
2. Unobligated balance:		
A. Brought forward October 1	1,253,281	
B. Net transfers PY balance, actual (+ or -)	(201,231)	A/
C. Anticipated transfer PY balance (+ or -)		
3. Spending authority from offsetting collections (gross):		
A. Earned:		
1. Collected	284,533	
2. Receivable from Federal sources	(284,533)	
B. Change in unfilled customer orders(+ or -):		
1. Advance received		
2. Without advance from Federal sources		
C. Anticipated for rest of year:		
1. Advance for anticipated orders		
2. Without advance		
D. Transfers from trust funds:		
1. Collected		
2. Anticipated		
4. Recoveries of prior year obligations:		
A. Actual	1,906	
B. Anticipated		
5. Temporarily not available pursuant to P.L._____(-)		
6. Permanently not available:		
A. Cancellations of expired and no-year accounts(-)		
B. Enacted rescissions of PY balances(-)		
C. Capital transfer and redemption of debt(-)		
D. Other authority withdrawn(-)		
E. Pursuant to Public Law _____(-)		
F. Anticipated for rest of year		
7. TOTAL BUDGETARY RESOURCES	1,053,956	

**Exhibit 1 to Declaration of Lovell Hopper,
Director of the Division of Financial Management
for the Indian Health Service,
dated May 12, 2003
[See JA Vol. I, PART 2 for Revised Supplemental Brief
and Declaration of Lovell Hopper]**

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

IHS SUMMARY

BUDGET ACTIVITY	ADVICED TO AREA FY 1994 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1994 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	786,108,572	428,469,255	214,037,295	9,477,793	134,124,229	786,108,572	0
DENTAL	52,126,833	30,196,307	9,101,954	221,743	12,606,830	52,126,833	0
MENTAL HEALTH	33,867,594	13,174,296	8,670,217	342,911	11,680,170	33,867,594	0
ALCOHOL & SUB ABUSE	84,838,925	5,980,135	61,045,429	847,953	16,965,408	84,838,925	0
TOTAL CLIN'L SVCS	956,941,924	477,819,992	292,854,895	10,890,400	175,376,637	956,941,924	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	21,430,311	11,304,234	4,579,467	13,340	5,533,270	21,430,311	0
HEALTH EDUCATION	7,636,817	1,550,894	3,632,563	60,790	2,392,570	7,636,817	0
COMMUNITY HLTH REPR	40,232,400	248,872	36,331,969	0	3,651,559	40,232,400	0
IMMUNIZATION	1,348,000	708,685	166,019	0	473,296	1,348,000	0
TOTAL PREVENTIVE HLTH	70,647,528	13,812,685	44,710,018	74,130	12,050,695	70,647,528	0
URBAN HEALTH	22,834,000	0	22,004,300	0	829,700	22,834,000	0
INDIAN HLTH PROFESSIONS	27,406,000	320,800	16,650	0	27,068,550	27,406,000	0
TRIBAL MANAGEMENT	5,204,485	0	5,204,485	0	0	5,204,485	0
DIRECT OPERATIONS	48,929,388	0	(0)	14,557,930	34,371,458	48,929,388	(0)
CONTRACT SUPPORT COSTS	122,432,970	0	122,432,970	0	0	122,432,970	0
OFFICE OF TRIBAL SELF-GOVN	34,132,705	0	33,688,255	0	444,450	34,132,705	0
						0	0
TOTAL SVCS APPROPR	1,288,529,000	491,953,477	520,911,573	25,522,460	250,141,490	1,288,529,000	(0)

525

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREAS ONLY

BUDGET ACTIVITY	ADVICED TO AREA FY 1994	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1994 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	722,096,145	428,469,255	214,037,295	9,022,793	70,566,802	722,096,145	0
DENTAL	51,559,483	30,196,307	9,101,954	221,743	12,039,480	51,559,483	0
MENTAL HEALTH	32,167,094	13,174,296	8,670,217	342,911	9,979,670	32,167,094	0
ALCOHOL & SUB ABUSE	82,880,325	5,980,135	61,045,429	847,953	15,006,808	82,880,325	0
TOTAL CLIN'L SVCS	888,703,047	477,819,992	292,854,895	10,435,400	107,592,760	888,703,047	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	21,384,851	11,304,234	4,579,467	13,340	5,487,810	21,384,851	0
HEALTH EDUCATION	7,599,437	1,550,894	3,632,563	60,790	2,355,190	7,599,437	0
COMMUNITY HLTH REPR	39,807,100	248,872	36,331,969	0	3,226,259	39,807,100	0
IMMUNIZATION	1,348,000	708,685	166,019	0	473,296	1,348,000	0
TOTAL PREVENTIVE HLTH	70,139,388	13,812,685	44,710,018	74,130	11,542,555	70,139,388	0
URBAN HEALTH	15,629,225	0	15,338,225	0	291,000	15,629,225	0
INDIAN HLTH PROFESSIONS	605,400	320,800	16,650	0	267,950	605,400	0
TRIBAL MANAGEMENT	100,000	0	100,000	0	0	100,000	0
DIRECT OPERATIONS	22,905,188	0	(0)	4,553,046	18,352,142	22,905,188	(0)
CONTRACT SUPPORT COSTS	122,408,070	0	122,408,070	0	0	122,408,070	0
OFFICE OF TRIBAL SELF-GOVN	1,244,460	0	1,183,960	0	60,500	1,244,460	0
						0	0
TOTAL SVCS APPROPR	1,121,734,778	491,953,477	476,611,818	15,062,576	138,106,907	1,121,734,778	(0)

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

HDQTRS ONLY

BUDGET ACTIVITY	ADVICED TO AREA FY 1994 (1)	FEDERAL SVC UNITS (2)	TRIBAL/URBAN PROGRAMS (3)	HEADQUARTERS RESIDUAL (4)	HEADQUARTERS NON-RESIDUAL (5)	FY 1994 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	64,012,427	0	0	455,000	63,557,427	64,012,427	0
DENTAL	567,350	0	0	0	567,350	567,350	0
MENTAL HEALTH	1,700,500	0	0	0	1,700,500	1,700,500	0
ALCOHOL & SUB ABUSE	1,958,600	0	0	0	1,958,600	1,958,600	0
TOTAL CLIN'L SVCS	68,238,877	0	0	455,000	67,783,877	68,238,877	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	45,460	0	0	0	45,460	45,460	0
HEALTH EDUCATION	37,380	0	0	0	37,380	37,380	0
COMMUNITY HLTH REPR	425,300	0	0	0	425,300	425,300	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	508,140	0	0	0	508,140	508,140	0
URBAN HEALTH	7,204,775	0	6,666,075	0	538,700	7,204,775	0
INDIAN HLTH PROFESSIONS	26,800,600	0	0	0	26,800,600	26,800,600	0
TRIBAL MANAGEMENT	5,104,485	0	5,104,485	0	0	5,104,485	0
DIRECT OPERATIONS	26,024,200	0	0	10,004,884	16,019,316	26,024,200	0
CONTRACT SUPPORT COSTS	24,900	0	24,900	0	0	24,900	0
OFFICE OF TRIBAL SELF-GOVN	32,888,245	0	32,504,295	0	383,950	32,888,245	0
						0	0
TOTAL SVCS APPROPR	166,794,222	0	44,299,755	10,459,884	112,034,583	166,794,222	0

17a

527

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: ABERDEEN

BUDGET ACTIVITY	ADVICED TO AREA FY 1994 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	1/ AREA OFFICE RESIDUAL (4)	1/ AREA OFFICE NON-RESIDUAL (5)	FY 1994 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	76,112,741	57,797,696	10,689,897	0	7,625,148	76,112,741	0
DENTAL	6,326,600	5,156,205	678,395	0	492,000	6,326,600	0
MENTAL HEALTH	5,654,200	2,846,130	684,620	0	2,123,450	5,654,200	0
ALCOHOL & SUB ABUSE	8,003,700	108,377	6,333,755	0	1,561,568	8,003,700	0
TOTAL CLIN'L SVCS	96,097,241	65,908,408	18,386,667	0	11,802,166	96,097,241	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	3,460,400	2,783,122	669,278	0	8,000	3,460,400	0
HEALTH EDUCATION	965,700	383,572	553,046	0	29,082	965,700	0
COMMUNITY HLTH REPR	5,327,610	110,000	5,130,069	0	87,541	5,327,610	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	9,753,710	3,276,694	6,352,393	0	124,623	9,753,710	0
URBAN HEALTH	759,100	0	759,100	0	0	759,100	0
INDIAN HLTH PROFESSIONS	66,000	0	0	0	66,000	66,000	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	2,036,550	0	0	0	2,036,550	2,036,550	0
CONTRACT SUPPORT COSTS	6,461,929	0	6,461,929	0	0	6,461,929	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	115,174,530	69,185,102	31,960,089	0	14,029,339	115,174,530	0

1/ **The Aberdeen Area established residual through tribal consultation for FY1997 tribal shares negotiations.**

184

528

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: ALASKA

BUDGET ACTIVITY	ADVICED TO AREA FY 1994 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1994 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	124,311,564	32,640,658	72,377,992	0	19,292,914	124,311,564	0
DENTAL	5,411,100	1,349,609	3,264,460	0	797,031	5,411,100	0
MENTAL HEALTH	3,093,000	651,795	1,589,458	0	851,747	3,093,000	0
ALCOHOL & SUB ABUSE	8,438,600	506,546	7,458,027	0	474,027	8,438,600	0
TOTAL CLIN'L SVCS	141,254,264	35,148,608	84,689,937	0	21,415,719	141,254,264	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	557,400	61,979	317,790	0	177,631	557,400	0
HEALTH EDUCATION	906,900	106,052	684,098	0	116,750	906,900	0
COMMUNITY HLTH REPR	3,359,200	130,248	3,014,345	0	214,607	3,359,200	0
IMMUNIZATION	1,348,000	708,685	166,019	0	473,296	1,348,000	0
TOTAL PREVENTIVE HLTH	6,171,500	1,006,964	4,182,252	0	982,284	6,171,500	0
URBAN HEALTH	0	0	0	0	- 0	0	0
INDIAN HLTH PROFESSIONS	63,000	0	0	0	63,000	63,000	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	3,138,525	0	0	0	3,138,525	3,138,525	0
CONTRACT SUPPORT COSTS	35,123,929	0	35,123,929	0	0	35,123,929	0
OFFICE OF TRIBAL SELF-GOVN	166,450	0	157,850	0	8,600	166,450	0
						0	0
TOTAL SVCS APPROPR	185,917,668	36,155,572	124,153,968	0	25,608,128	185,917,668	0

19a

529

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: ALBUQUERQUE

BUDGET ACTIVITY	ADVICED TO AREA FY 1994 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1994 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	43,651,735	34,755,687	3,618,650	0	5,277,398	43,651,735	0
DENTAL	4,419,000	0	0	0	4,419,000	4,419,000	0
MENTAL HEALTH	2,707,000	0	0	0	2,707,000	2,707,000	0
ALCOHOL & SUB ABUSE	7,374,000	0	0	0	7,374,000	7,374,000	0
TOTAL CLIN'L SVCS	58,151,735	34,755,687	3,618,650	0	19,777,398	58,151,735	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	1,857,720	0	0	0	1,857,720	1,857,720	0
HEALTH EDUCATION	839,370	0	0	0	839,370	839,370	0
COMMUNITY HLTH REPR	2,500,500	0	0	0	2,500,500	2,500,500	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	5,197,590	0	0	0	5,197,590	5,197,590	0
URBAN HEALTH	470,800	0	470,800	0	0	470,800	0
INDIAN HLTH PROFESSIONS	99,000	0	0	0	99,000	99,000	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,140,250	0	0	0	1,140,250	1,140,250	0
CONTRACT SUPPORT COSTS	3,781,407	0	3,781,407	0	0	3,781,407	0
OFFICE OF TRIBAL SELF-GOVN	5,325	0	0	0	5,325	5,325	0
						0	0
TOTAL SVCS APPROPR	68,846,107	34,755,687	7,870,857	0	26,219,563	68,846,107	0

20a

530

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: BEMIDJI

BUDGET ACTIVITY	ADVICED TO AREA FY 1994 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1994 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	31,970,185	8,631,950	20,780,620	0	2,557,615	31,970,185	0
DENTAL	1,729,300	873,297	797,207	0	58,796	1,729,300	0
MENTAL HEALTH	1,223,000	310,642	660,420	0	251,938	1,223,000	0
ALCOHOL & SUB ABUSE	5,572,713	0	4,903,987	0	668,726	5,572,713	0
TOTAL CLIN'L SVCS	40,495,198	9,815,888	27,142,234	0	3,537,075	40,495,198	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	710,480	0	710,480	0	0	710,480	0
HEALTH EDUCATION	304,900	0	158,548	0	146,352	304,900	0
COMMUNITY HLTH REPR	2,703,500	0	2,703,500	0	0	2,703,500	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	3,718,880	0	3,572,528	0	146,352	3,718,880	0
URBAN HEALTH	2,611,525	0	2,611,525	0	0	2,611,525	0
INDIAN HLTH PROFESSIONS	17,000	7,000	10,000	0	0	17,000	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,161,506	0	0	0	1,161,506	1,161,506	0
CONTRACT SUPPORT COSTS	7,999,487	0	7,999,487	0	0	7,999,487	0
OFFICE OF TRIBAL SELF-GOVN	1,150	0	0	0	1,150	1,150	0
						0	0
TOTAL SVCS APPROPR	56,004,746	9,822,888	41,335,774	0	4,846,083	56,004,746	0

21a

531

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: BILLINGS

BUDGET ACTIVITY	ADVICED TO AREA FY 1994 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1994 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	34,310,630	28,915,585	1,122,945	3,874,800	397,300	34,310,630	0
DENTAL	3,151,940	3,053,095	8,645	78,900	11,300	3,151,940	0
MENTAL HEALTH	2,198,000	2,005,700	0	168,200	24,100	2,198,000	0
ALCOHOL & SUB ABUSE	6,108,774	2,057,923	3,189,851	753,400	107,600	6,108,774	0
TOTAL CLIN'L SVCS	45,769,344	36,032,303	4,321,441	4,875,300	540,300	45,769,344	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	1,422,120	1,198,454	223,666	0	0	1,422,120	0
HEALTH EDUCATION	592,200	267,694	271,906	46,000	6,600	592,200	0
COMMUNITY HLTH REPR	2,786,960	8,624	2,778,336	0	0	2,786,960	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	4,801,280	1,474,772	3,273,908	46,000	6,600	4,801,280	0
URBAN HEALTH	1,045,800	0	1,045,800	0	0	1,045,800	0
INDIAN HLTH PROFESSIONS	130,000	130,000	0	0	0	130,000	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,812,800	0	0	1,709,700	103,100	1,812,800	0
CONTRACT SUPPORT COSTS	2,372,066	0	2,372,066	0	0	2,372,066	0
OFFICE OF TRIBAL SELF-GOVN	9,075	0	9,075	0	0	9,075	0
						0	0
TOTAL SVCS APPROPR	55,940,365	37,637,075	11,022,290	6,631,000	650,000	55,940,365	0

22a

532

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: CALIFORNIA

BUDGET ACTIVITY	ADVICED TO AREA FY 1994	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1994 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	37,046,953	0	33,342,258	1,176,400	2,528,295	37,046,953	0
DENTAL	730,850	0	526,212	97,800	106,838	730,850	0
MENTAL HEALTH	927,400	0	834,660	52,000	40,740	927,400	0
ALCOHOL & SUB ABUSE	6,938,000	0	6,521,720	76,100	340,180	6,938,000	0
TOTAL CLIN'L SVCS	45,643,203	0	41,224,850	1,402,300	3,016,053	45,643,203	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	233,600	0	228,928	0	4,672	233,600	0
HEALTH EDUCATION	246,150	0	73,845	0	172,305	246,150	0
COMMUNITY HLTH REPR	1,469,200	0	1,457,593	0	11,607	1,469,200	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	1,948,950	0	1,760,366	0	188,584	1,948,950	0
URBAN HEALTH	3,985,200	0	3,985,200	0	0	3,985,200	0
INDIAN HLTH PROFESSIONS	4,000	0	0	0	4,000	4,000	0
TRIBAL MANAGEMENT	100,000	0	100,000	0	0	100,000	0
DIRECT OPERATIONS	1,058,750	0	0	515,300	543,450	1,058,750	0
CONTRACT SUPPORT COSTS	18,294,270	0	18,294,270	0	0	18,294,270	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	71,034,373	0	65,364,686	1,917,600	3,752,087	71,034,373	0

23a

533

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: NASHVILLE

BUDGET ACTIVITY	ADVICED TO AREA FY 1994	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1994 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	28,750,499	6,271,879	18,595,123	608,881	3,274,616	28,750,499	0
DENTAL	1,234,200	759,160	359,412	0	115,628	1,234,200	0
MENTAL HEALTH	973,300	83,300	745,199	27,761	117,040	973,300	0
ALCOHOL & SUB ABUSE	5,112,700	1,360,604	3,449,465	5,202	297,429	5,112,700	0
TOTAL CLIN'L SVCS	36,070,699	8,474,943	23,149,199	641,844	3,804,713	36,070,699	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	398,900	179,201	205,306	0	14,393	398,900	0
HEALTH EDUCATION	333,500	120,051	118,328	0	95,121	333,500	0
COMMUNITY HLTH REPR	2,330,100	0	2,330,100	0	0	2,330,100	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	3,062,500	299,252	2,653,734	0	109,514	3,062,500	0
URBAN HEALTH	574,700	0	573,500	0	1,200	574,700	0
INDIAN HLTH PROFESSIONS	26,000	26,000	0	0	0	26,000	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,404,350	0	(0)	556,796	847,554	1,404,350	0
CONTRACT SUPPORT COSTS	11,298,820	0	11,298,820	0	0	11,298,820	0
OFFICE OF TRIBAL SELF-GOVN	11,875	0	0	0	11,875	11,875	0
						0	0
TOTAL SVCS APPROPR	52,448,944	8,800,195	37,675,253	1,198,640	4,774,856	52,448,944	0

24a

534

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: NAVAJO

BUDGET ACTIVITY	ADVICED TO AREA FY 1994 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1994 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	105,095,490	99,112,324	2,536,166	0	3,447,000	105,095,490	0
DENTAL	9,465,600	8,430,800	0	0	1,034,800	9,465,600	0
MENTAL HEALTH	4,450,300	4,065,300	298,000	0	87,000	4,450,300	0
ALCOHOL & SUB ABUSE	10,182,400	436,200	9,746,200	0	0	10,182,400	0
TOTAL CLIN'L SVCS	129,193,790	112,044,624	12,580,366	0	4,568,800	129,193,790	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	4,841,200	4,191,200	493,100	0	156,900	4,841,200	0
HEALTH EDUCATION	994,800	0	994,800	0	0	994,800	0
COMMUNITY HLTH REPR	5,142,300	0	5,142,300	0	0	5,142,300	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	10,978,300	4,191,200	6,630,200	0	156,900	10,978,300	0
URBAN HEALTH	255,400	0	255,400	0	0	255,400	0
INDIAN HLTH PROFESSIONS	51,000	51,000	0	0	0	51,000	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	2,673,450	0	0	0	2,673,450	2,673,450	0
CONTRACT SUPPORT COSTS	3,937,916	0	3,937,916	0	0	3,937,916	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	147,089,856	116,286,824	23,403,882	0	7,399,150	147,089,856	0

25a

535

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: OKLAHOMA

BUDGET ACTIVITY	ADVICED TO AREA FY 1994	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1994 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	113,524,821	76,141,576	28,900,489	1,953,584	6,529,172	113,524,821	0
DENTAL	9,288,049	6,270,752	2,235,968	3,747	777,582	9,288,049	0
MENTAL HEALTH	3,814,500	2,177,351	1,119,267	6,413	511,469	3,814,500	0
ALCOHOL & SUB ABUSE	5,703,997	270,000	5,185,775	13,251	234,971	5,703,997	0
TOTAL CLIN'L SVCS	132,331,367	84,859,679	37,441,499	1,976,995	8,053,194	132,331,367	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	2,360,717	1,200,653	1,024,297	0	135,767	2,360,717	0
HEALTH EDUCATION	637,900	324,347	152,877	0	160,676	637,900	0
COMMUNITY HLTH REPR	4,692,500	0	4,513,646	0	178,854	4,692,500	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	7,691,117	1,525,000	5,690,820	0	475,297	7,691,117	0
URBAN HEALTH	1,075,600	0	1,075,600	0	0	1,075,600	0
INDIAN HLTH PROFESSIONS	100,000	73,800	6,650	0	19,550	100,000	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	2,905,675	0	0	928,341	1,977,334	2,905,675	0
CONTRACT SUPPORT COSTS	10,654,062	0	10,654,062	0	0	10,654,062	0
OFFICE OF TRIBAL SELF-GOVN	5,275	0	0	0	5,275	5,275	0
							0
TOTAL SVCS APPROPR	154,763,096	86,458,479	54,868,631	2,905,336	10,530,650	154,763,096	0

26a

536

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: PHOENIX

BUDGET ACTIVITY	ADVICED TO AREA FY 1994	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1994 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	80,544,610	63,348,986	5,746,101	0	11,449,523	80,544,610	0
DENTAL	4,850,800	650,510	74,890	0	4,125,400	4,850,800	0
MENTAL HEALTH	3,685,900	0	1,068,801	0	2,617,099	3,685,900	0
ALCOHOL & SUB ABUSE	7,850,700	1,139,485	3,600,400	0	3,110,815	7,850,700	0
TOTAL CLIN'L SVCS	96,932,010	65,138,981	10,490,192	0	21,302,837	96,932,010	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	3,331,740	0	231,673	0	3,100,067	3,331,740	0
HEALTH EDUCATION	962,500	0	209,776	0	752,724	962,500	0
COMMUNITY HLTH REPR	4,551,550	0	4,404,900	0	146,650	4,551,550	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	8,845,790	0	4,846,349	0	3,999,441	8,845,790	0
URBAN HEALTH	1,316,200	0	1,316,200	0	0	1,316,200	0
INDIAN HLTH PROFESSIONS	12,400	0	0	0	12,400	12,400	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	2,445,575	0	0	0	2,445,575	2,445,575	0
CONTRACT SUPPORT COSTS	4,711,203	0	4,711,203	0	0	4,711,203	0
OFFICE OF TRIBAL SELF-GOVN	25,500	0	25,000	0	500	25,500	0
						0	0
TOTAL SVCS APPROPR	114,288,678	65,138,981	21,388,944	0	27,760,753	114,288,678	0

278

537

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: PORTLAND

BUDGET ACTIVITY	ADVICED TO AREA FY 1994	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1994 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	33,636,334	13,328,266	15,554,768	1,409,128	3,344,172	33,636,334	0
DENTAL	4,234,944	2,935,779	1,156,765	41,296	101,104	4,234,944	0
MENTAL HEALTH	2,658,694	1,034,078	1,310,316	88,537	216,763	2,658,694	0
ALCOHOL & SUB ABUSE	9,496,541	101,000	9,395,541	0	0	9,496,541	0
TOTAL CLIN'L SVCS	50,026,513	17,399,123	27,426,390	1,538,961	3,662,039	50,026,513	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	1,800,014	1,279,065	474,949	13,340	32,660	1,800,014	0
HEALTH EDUCATION	702,717	236,378	415,339	14,790	36,210	702,717	0
COMMUNITY HLTH REPR	3,171,330	0	3,171,330	0	0	3,171,330	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	5,674,061	1,515,443	4,061,618	28,130	68,870	5,674,061	0
URBAN HEALTH	3,245,100	0	3,245,100	0	0	3,245,100	0
INDIAN HLTH PROFESSIONS	33,000	33,000	0	0	0	33,000	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,916,507	0	0	842,909	1,073,598	1,916,507	0
CONTRACT SUPPORT COSTS	16,775,644	0	16,775,644	0	0	16,775,644	0
OFFICE OF TRIBAL SELF-GOVN	992,035	0	992,035	0	0	992,035	0
						0	0
TOTAL SVCS APPROPR	78,662,860	18,947,566	52,500,787	2,410,000	4,804,507	78,662,860	0

28a

538

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: TUCSON

BUDGET ACTIVITY	ADVICED TO AREA FY 1994	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1994 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	13,140,583	7,524,648	772,286	0	4,843,649	13,140,583	0
DENTAL	717,100	717,100	0	0	0	717,100	0
MENTAL HEALTH	781,800	0	350,476	0	431,324	781,800	0
ALCOHOL & SUB ABUSE	2,098,200	0	1,260,708	0	837,492	2,098,200	0
TOTAL CLIN'L SVCS	16,737,683	8,241,748	2,383,470	0	6,112,465	16,737,683	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	410,560	410,560	0	0	0	410,560	0
HEALTH EDUCATION	112,800	112,800	0	0	0	112,800	0
COMMUNITY HLTH REPR	1,772,350	0	1,685,850	0	86,500	1,772,350	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	2,295,710	523,360	1,685,850	0	86,500	2,295,710	0
URBAN HEALTH	289,800	0	0	0	289,800	289,800	0
INDIAN HLTH PROFESSIONS	4,000	0	0	0	4,000	4,000	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,211,250	0	0	0	1,211,250	1,211,250	0
CONTRACT SUPPORT COSTS	997,337	0	997,337	0	0	997,337	0
OFFICE OF TRIBAL SELF-GOVN	27,775	0	0	0	27,775	27,775	0
						0	0
TOTAL SVCS APPROPR	21,563,555	8,765,108	5,066,657	0	7,731,790	21,563,555	0

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: HQE-ROCKVILLE

BUDGET ACTIVITY	ADVICED TO AREA FY 1994 (1)	FEDERAL SVC UNITS (2)	TRIBAL/URBAN PROGRAMS (3)	HEADQUARTERS RESIDUAL (4)	HEADQUARTERS NON-RESIDUAL (5)	FY 1994 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	54,545,627	0	0	0	54,545,627	54,545,627	0
DENTAL	88,150	0	0	0	88,150	88,150	0
MENTAL HEALTH	661,600	0	0	0	661,600	661,600	0
ALCOHOL & SUB ABUSE	571,900	0	0	0	571,900	571,900	0
TOTAL CLIN'L SVCS	55,867,277	0	0	0	55,867,277	55,867,277	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	45,460	0	0	0	45,460	45,460	0
HEALTH EDUCATION	37,380	0	0	0	37,380	37,380	0
COMMUNITY HLTH REPR	425,300	0	0	0	425,300	425,300	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	508,140	0	0	0	508,140	508,140	0
URBAN HEALTH	7,204,775	0	6,666,075	0	538,700	7,204,775	0
INDIAN HLTH PROFESSIONS	26,800,600	0	0	0	26,800,600	26,800,600	0
TRIBAL MANAGEMENT	5,104,485	0	5,104,485	0	0	5,104,485	0
DIRECT OPERATIONS	24,158,500	0	0	10,004,884	14,153,616	24,158,500	0
CONTRACT SUPPORT COSTS	24,900	0	24,900	0	0	24,900	0
OFFICE OF TRIBAL SELF-GOVN	32,887,745	0	32,504,295	0	383,450	32,887,745	0
						0	0
TOTAL SVCS APPROPR	152,556,422	0	44,299,755	10,004,884	98,251,783	152,556,422	0

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1994

AREA: HQW-ALBUQ/NAT'L PROGRAMS

BUDGET ACTIVITY	ADVICED TO AREA FY 1994 (1)	FEDERAL SVC UNITS (2)	TRIBAL/URBAN PROGRAMS (3)	HEADQUARTERS RESIDUAL (4)	HEADQUARTERS NON-RESIDUAL (5)	FY 1994 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	9,466,800	0	0	455,000	9,011,800	9,466,800	0
DENTAL	479,200	0	0	0	479,200	479,200	0
MENTAL HEALTH	1,038,900	0	0	0	1,038,900	1,038,900	0
ALCOHOL & SUB ABUSE	1,386,700	0	0	0	1,386,700	1,386,700	0
TOTAL CLIN'L SVCS	12,371,600	0	0	455,000	11,916,600	12,371,600	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	0	0	0	0	0	0	0
HEALTH EDUCATION	0	0	0	0	0	0	0
COMMUNITY HLTH REPR	0	0	0	0	0	0	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	0	0	0	0	0	0	0
URBAN HEALTH	0	0	0	0	0	0	0
INDIAN HLTH PROFESSIONS	0	0	0	0	0	0	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,865,700	0	0	0	1,865,700	1,865,700	0
CONTRACT SUPPORT COSTS	0	0	0	0	0	0	0
OFFICE OF TRIBAL SELF-GOVN	500	0	0	0	500	500	0
						0	0
TOTAL SVCS APPROPR	14,237,800	0	0	455,000	13,782,800	14,237,800	0

31a

541

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

IHS SUMMARY

BUDGET ACTIVITY	ADVICED TO AREA FY 1995	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1995 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	748,977,440	425,065,309	185,997,266	12,130,215	125,784,650	748,977,440	0
DENTAL	51,951,133	32,165,503	8,441,078	276,247	11,068,305	51,951,133	0
MENTAL HEALTH	31,679,867	13,562,004	6,666,873	325,774	11,125,216	31,679,867	0
ALCOHOL & SUB ABUSE	78,648,243	6,955,169	52,732,879	1,106,553	17,853,642	78,648,243	0
TOTAL CLIN'L SVCS	911,256,683	477,747,985	253,838,096	13,838,789	165,831,813	911,256,683	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	20,896,324	12,410,191	3,215,680	0	5,270,453	20,896,324	0
HEALTH EDUCATION	6,824,763	1,435,790	2,771,629	221,400	2,395,944	6,824,763	0
COMMUNITY HLTH REPR	35,087,935	221,378	31,506,824	0	3,359,733	35,087,935	0
IMMUNIZATION	1,098,058	733,729	110,393	0	253,936	1,098,058	0
TOTAL PREVENTIVE HLTH	63,907,080	14,801,088	37,604,526	221,400	11,280,066	63,907,080	0
URBAN HEALTH	23,349,317	1,156,334	21,285,133	0	907,850	23,349,317	0
INDIAN HLTH PROFESSIONS	27,479,333	275,250	38,500	0	27,165,583	27,479,333	0
TRIBAL MANAGEMENT	5,047,766	1,275	5,042,591	0	3,900	5,047,766	0
DIRECT OPERATIONS	45,587,375	1,400	1,075	15,098,385	30,486,515	45,587,375	0
CONTRACT SUPPORT COSTS	80,280,197	378,109	79,902,088	0	0	80,280,197	0
OFFICE OF TRIBAL SELF-GOVN	180,134,467	0	179,568,717	0	565,750	180,134,467	0
						0	0
TOTAL SVCS APPROPR	1,337,042,218	494,361,441	577,280,725	29,158,574	236,241,477	1,337,042,218	0
							0

32a

542

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREAS ONLY

BUDGET ACTIVITY	ADVICED TO AREA FY 1995 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1995 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	687,294,592	425,065,309	185,997,266	12,130,215	64,101,802	687,294,592	0
DENTAL	51,411,582	32,165,503	8,441,078	276,247	10,528,754	51,411,582	0
MENTAL HEALTH	30,096,534	13,562,004	6,666,873	325,774	9,541,883	30,096,534	0
ALCOHOL & SUB ABUSE	75,955,270	6,955,169	52,732,879	1,106,553	15,160,669	75,955,270	0
TOTAL CLIN'L SVCS	844,757,978	477,747,985	253,838,096	13,838,789	99,333,108	844,757,978	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	20,892,337	12,410,191	3,215,680	0	5,266,466	20,892,337	0
HEALTH EDUCATION	6,663,366	1,435,790	2,771,629	221,400	2,234,547	6,663,366	0
COMMUNITY HLTH REPR	34,696,489	221,378	31,506,824	0	2,968,287	34,696,489	0
IMMUNIZATION	1,098,058	733,729	110,393	0	253,936	1,098,058	0
TOTAL PREVENTIVE HLTH	63,350,250	14,801,088	37,604,526	221,400	10,723,236	63,350,250	0
URBAN HEALTH	15,978,150	1,156,334	14,520,141	0	301,675	15,978,150	0
INDIAN HLTH PROFESSIONS	735,433	275,250	38,500	0	421,683	735,433	0
TRIBAL MANAGEMENT	11,800	1,275	6,625	0	3,900	11,800	0
DIRECT OPERATIONS	21,140,012	1,400	1,075	5,093,501	16,044,036	21,140,012	0
CONTRACT SUPPORT COSTS	79,960,005	378,109	79,581,896	0	0	79,960,005	0
OFFICE OF TRIBAL SELF-GOVN	93,950	0	64,500	0	29,450	93,950	0
						0	0
TOTAL SVCS APPROPR	1,026,027,578	494,361,441	385,655,358	19,153,690	126,857,088	1,026,027,578	0

33a

543

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

HDQTRS ONLY

BUDGET ACTIVITY	ADVICED TO AREA FY 1995 (1)	FEDERAL SVC UNITS (2)	TRIBAL/URBAN PROGRAMS (3)	HEADQUARTERS RESIDUAL (4)	HEADQUARTERS NON-RESIDUAL (5)	FY 1995 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	61,682,848	0	0	0	61,682,848	61,682,848	0
DENTAL	539,551	0	0	0	539,551	539,551	0
MENTAL HEALTH	1,583,333	0	0	0	1,583,333	1,583,333	0
ALCOHOL & SUB ABUSE	2,692,973	0	0	0	2,692,973	2,692,973	0
TOTAL CLIN'L SVCS	66,498,705	0	0	0	66,498,705	66,498,705	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	3,987	0	0	0	3,987	3,987	0
HEALTH EDUCATION	161,397	0	0	0	161,397	161,397	0
COMMUNITY HLTH REPR	391,446	0	0	0	391,446	391,446	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	556,830	0	0	0	556,830	556,830	0
URBAN HEALTH	7,371,167	0	6,764,992	0	606,175	7,371,167	0
INDIAN HLTH PROFESSIONS	26,743,900	0	0	0	26,743,900	26,743,900	0
TRIBAL MANAGEMENT	5,035,966	0	5,035,966	0	0	5,035,966	0
DIRECT OPERATIONS	24,447,363	0	0	10,004,884	14,442,479	24,447,363	0
CONTRACT SUPPORT COSTS	320,192	0	320,192	0	0	320,192	0
OFFICE OF TRIBAL SELF-GOVN	180,040,517	0	179,504,217	0	536,300	180,040,517	0
						0	0
TOTAL SVCS APPROPR	311,014,640	0	191,625,367	10,004,884	109,384,389	311,014,640	0

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

IHS SUMMARY

BUDGET ACTIVITY	ADVICED TO AREA FY 1995	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1995 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	748,977,440	425,065,309	185,997,266	12,130,215	125,784,650	748,977,440	0
DENTAL	51,951,133	32,165,503	8,441,078	276,247	11,068,305	51,951,133	0
MENTAL HEALTH	31,679,867	13,562,004	6,666,873	325,774	11,125,216	31,679,867	0
ALCOHOL & SUB ABUSE	78,648,243	6,955,169	52,732,879	1,106,553	17,853,642	78,648,243	0
TOTAL CLIN'L SVCS	911,256,683	477,747,985	253,838,096	13,838,789	165,831,813	911,256,683	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	20,896,324	12,410,191	3,215,680	0	5,270,453	20,896,324	0
HEALTH EDUCATION	6,824,763	1,435,790	2,771,629	221,400	2,395,944	6,824,763	0
COMMUNITY HLTH REPR	35,087,935	221,378	31,506,824	0	3,359,733	35,087,935	0
IMMUNIZATION	1,098,058	733,729	110,393	0	253,936	1,098,058	0
TOTAL PREVENTIVE HLTH	63,907,080	14,801,088	37,604,526	221,400	11,280,066	63,907,080	0
URBAN HEALTH	23,349,317	1,158,334	21,285,133	0	907,850	23,349,317	0
INDIAN HLTH PROFESSIONS	27,479,333	275,250	38,500	0	27,165,583	27,479,333	0
TRIBAL MANAGEMENT	5,047,766	1,275	5,042,591	0	3,900	5,047,766	0
DIRECT OPERATIONS	45,587,375	1,400	1,075	15,098,385	30,486,515	45,587,375	0
CONTRACT SUPPORT COSTS	80,280,197	378,109	79,902,088	0	0	80,280,197	0
OFFICE OF TRIBAL SELF-GOVN	180,134,467	0	179,568,717	0	565,750	180,134,467	0
						0	0
TOTAL SVCS APPROPR	1,337,042,218	494,361,441	577,280,725	29,158,574	236,241,477	1,337,042,218	0
							0

35a

545

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREAS ONLY

BUDGET ACTIVITY	ADVICED TO AREA FY 1995 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1995 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	687,294,592	425,065,309	185,997,266	12,130,215	64,101,802	687,294,592	0
DENTAL	51,411,582	32,165,503	8,441,078	276,247	10,528,754	51,411,582	0
MENTAL HEALTH	30,096,534	13,562,004	6,666,873	325,774	9,541,883	30,096,534	0
ALCOHOL & SUB ABUSE	75,955,270	6,955,169	52,732,879	1,106,553	15,160,669	75,955,270	0
TOTAL CLIN'L SVCS	844,757,978	477,747,985	253,838,096	13,838,789	99,333,108	644,757,978	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	20,892,337	12,410,191	3,215,680	0	5,266,466	20,892,337	0
HEALTH EDUCATION	6,663,366	1,435,790	2,771,629	221,400	2,234,547	6,663,366	0
COMMUNITY HLTH REPR	34,696,489	221,378	31,506,824	0	2,968,287	34,696,489	0
IMMUNIZATION	1,098,058	733,729	110,393	0	253,936	1,098,058	0
TOTAL PREVENTIVE HLTH	63,350,250	14,801,088	37,604,526	221,400	10,723,236	63,350,250	0
URBAN HEALTH	15,978,150	1,156,334	14,520,141	0	301,675	15,978,150	0
INDIAN HLTH PROFESSIONS	735,433	275,250	38,500	0	421,683	735,433	0
TRIBAL MANAGEMENT	11,800	1,275	6,625	0	3,900	11,800	0
DIRECT OPERATIONS	21,140,012	1,400	1,075	5,093,501	16,044,036	21,140,012	0
CONTRACT SUPPORT COSTS	79,960,005	378,109	79,581,896	0	0	79,960,005	0
OFFICE OF TRIBAL SELF-GOVN	93,950	0	64,500	0	29,450	93,950	0
						0	0
TOTAL SVCS APPROPR	1,026,027,578	494,361,441	385,655,358	19,153,690	126,857,088	1,026,027,578	0

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

HDQTRS ONLY

BUDGET ACTIVITY	ADVICED TO AREA FY 1995 (1)	FEDERAL SVC UNITS (2)	TRIBAL/URBAN PROGRAMS (3)	HEADQUARTERS RESIDUAL (4)	HEADQUARTERS NON-RESIDUAL (5)	FY 1995 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	61,682,848	0	0	0	61,682,848	61,682,848	0
DENTAL	539,551	0	0	0	539,551	539,551	0
MENTAL HEALTH	1,583,333	0	0	0	1,583,333	1,583,333	0
ALCOHOL & SUB ABUSE	2,692,973	0	0	0	2,692,973	2,692,973	0
TOTAL CLIN'L SVCS	66,498,705	0	0	0	66,498,705	66,498,705	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	3,987	0	0	0	3,987	3,987	0
HEALTH EDUCATION	161,397	0	0	0	161,397	161,397	0
COMMUNITY HLTH REPR	391,446	0	0	0	391,446	391,446	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	556,830	0	0	0	556,830	556,830	0
URBAN HEALTH	7,371,167	0	6,764,992	0	606,175	7,371,167	0
INDIAN HLTH PROFESSIONS	26,743,900	0	0	0	26,743,900	26,743,900	0
TRIBAL MANAGEMENT	5,035,966	0	5,035,966	0	0	5,035,966	0
DIRECT OPERATIONS	24,447,363	0	0	10,004,884	14,442,479	24,447,363	0
CONTRACT SUPPORT COSTS	320,192	0	320,192	0	0	320,192	0
OFFICE OF TRIBAL SELF-GOVN	180,040,517	0	179,504,217	0	536,300	180,040,517	0
						0	0
TOTAL SVCS APPROPR	311,014,640	0	191,625,367	10,004,884	109,384,389	311,014,640	0

37a

547

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: ABERDEEN

BUDGET ACTIVITY	ADVICED TO AREA FY 1995	FEDERAL SVC UNITS	TRIBAL SVC UNITS	1/ AREA OFFICE RESIDUAL	1/ AREA OFFICE NON-RESIDUAL	FY 1995 AREA TOTAL	DIFFERENCE FROM ADVICED
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	78,392,082	58,458,028	11,389,651	0	8,544,403	78,392,082	0
DENTAL	6,525,600	5,596,285	539,953	0	389,362	6,525,600	0
MENTAL HEALTH	5,722,100	2,859,684	897,289	0	1,965,127	5,722,100	0
ALCOHOL & SUB ABUSE	8,155,473	168,277	6,134,927	0	1,852,269	8,155,473	0
TOTAL CLIN'L SVCS	98,795,255	67,082,274	18,961,820	0	12,751,161	98,795,255	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	3,612,500	3,070,600	520,400	0	21,500	3,612,500	0
HEALTH EDUCATION	981,300	355,204	552,571	0	73,525	981,300	0
COMMUNITY HLTH REPR	5,471,907	0	5,243,033	0	228,874	5,471,907	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	10,065,707	3,425,804	6,316,004	0	323,899	10,065,707	0
URBAN HEALTH	775,900	0	775,900	0	0	775,900	0
INDIAN HLTH PROFESSIONS	150,525	0	0	0	150,525	150,525	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	2,060,275	0	0	0	2,060,275	2,060,275	0
CONTRACT SUPPORT COSTS	6,910,466	0	6,910,466	0	0	6,910,466	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	118,758,128	70,508,078	32,964,190	0	15,285,860	118,758,128	0

1/ The Aberdeen Area established residual through tribal consultation for FY1997 tribal shares negotiations.

384

548

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: ALASKA

BUDGET ACTIVITY	ADVICED TO AREA FY 1995 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1995 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	100,337,471	31,718,126	51,536,433	1,444,250	15,638,662	100,337,471	0
DENTAL	4,679,498	1,461,554	3,090,992	0	126,952	4,679,498	0
MENTAL HEALTH	1,809,472	628,344	13,422	0	1,167,706	1,809,472	0
ALCOHOL & SUB ABUSE	4,789,608	762,561	2,983,648	0	1,043,399	4,789,608	0
TOTAL CLIN'L SVCS	111,616,049	34,570,585	57,624,495	1,444,250	17,976,719	111,616,049	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	140,700	62,818	0	0	77,882	140,700	0
HEALTH EDUCATION	248,500	107,967	0	0	140,533	248,500	0
COMMUNITY HLTH REPR	686,600	142,062	436,221	0	108,317	686,600	0
IMMUNIZATION	1,098,058	733,729	110,393	0	253,936	1,098,058	0
TOTAL PREVENTIVE HLTH	2,173,858	1,046,576	546,614	0	580,668	2,173,858	0
URBAN HEALTH	0	0	0	0		0	0
INDIAN HLTH PROFESSIONS	107,400	0	0	0	107,400	107,400	0
TRIBAL MANAGEMENT	700	0	0	0	700	700	0
DIRECT OPERATIONS	2,187,694	0	0	0	2,187,694	2,187,694	0
CONTRACT SUPPORT COSTS	3,739,185	0	3,739,185	0	0	3,739,185	0
OFFICE OF TRIBAL SELF-GOVN	42,250	0	41,000	0	1,250	42,250	0
							0
TOTAL SVCS APPROPR	119,867,136	35,617,161	61,951,294	1,444,250	20,854,431	119,867,136	0

39a

549

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: Albuqurque

BUDGET ACTIVITY	ADVICED TO AREA FY 1995	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1995 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	43,755,850	33,385,840	4,492,002	1,275,000	4,603,008	43,755,850	0
DENTAL	4,286,000	0	0	0	4,286,000	4,286,000	0
MENTAL HEALTH	2,737,350	0	0	0	2,737,350	2,737,350	0
ALCOHOL & SUB ABUSE	7,595,584	0	0	0	7,595,584	7,595,584	0
TOTAL CLIN'L SVCS	58,374,784	33,385,840	4,492,002	1,275,000	19,221,942	58,374,784	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	1,814,900	0	0	0	1,814,900	1,814,900	0
HEALTH EDUCATION	805,475	0	0	0	805,475	805,475	0
COMMUNITY HLTH REPR	2,570,650	0	0	0	2,570,650	2,570,650	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	5,191,025	0	0	0	5,191,025	5,191,025	0
URBAN HEALTH	472,900	0	472,900	0	0	472,900	0
INDIAN HLTH PROFESSIONS	91,482	0	0	0	91,482	91,482	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,150,775	0	0	150,000	1,000,775	1,150,775	0
CONTRACT SUPPORT COSTS	3,914,169	0	3,914,169	0	0	3,914,169	0
OFFICE OF TRIBAL SELF-GOVN	16,100	0	0	0	16,100	16,100	0
						0	0
TOTAL SVCS APPROPR	69,211,235	33,385,840	8,879,071	1,425,000	25,521,324	69,211,235	0

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: BEMIDJI

BUDGET ACTIVITY	ADVICED TO AREA FY 1995 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1995 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	29,647,599	7,530,490	19,982,482	392,400	1,742,227	29,647,599	0
DENTAL	1,590,372	709,306	801,547	0	79,519	1,590,372	0
MENTAL HEALTH	1,130,191	299,501	619,344	0	211,346	1,130,191	0
ALCOHOL & SUB ABUSE	5,042,981	0	4,654,671	147,900	240,410	5,042,981	0
TOTAL CLIN'L SVCS	37,411,143	8,539,297	26,058,044	540,300	2,273,502	37,411,143	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	591,800	0	591,800	0	0	591,800	0
HEALTH EDUCATION	243,158	0	124,254	0	118,904	243,158	0
COMMUNITY HLTH REPR	2,388,200	0	2,388,200	0	0	2,388,200	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	3,223,158	0	3,104,254	0	118,904	3,223,158	0
URBAN HEALTH	2,676,400	0	2,676,400	0	0	2,676,400	0
INDIAN HLTH PROFESSIONS	37,000	17,000	20,000	0	0	37,000	0
TRIBAL MANAGEMENT	1,000	0	0	0	1,000	1,000	0
DIRECT OPERATIONS	1,253,296	0	0	574,700	678,596	1,253,296	0
CONTRACT SUPPORT COSTS	6,359,902	0	6,359,902	0	0	6,359,902	0
OFFICE OF TRIBAL SELF-GOVN	12,175	0	10,000	0	2,175	12,175	0
							0
TOTAL SVCS APPROPR	50,974,074	8,556,297	38,228,599	1,115,000	3,074,177	50,974,074	0

418

551

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: BILLINGS

BUDGET ACTIVITY	ADVICED TO AREA FY 1995 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1995 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	36,352,951	30,685,198	1,294,353	3,793,100	580,300	36,352,951	0
DENTAL	3,255,731	3,142,684	8,747	82,400	21,900	3,255,731	0
MENTAL HEALTH	2,107,055	1,908,555	0	156,800	41,700	2,107,055	0
ALCOHOL & SUB ABUSE	5,733,455	2,087,237	2,666,118	773,900	206,200	5,733,455	0
TOTAL CLIN'L SVCS	47,449,192	37,823,674	3,969,218	4,806,200	850,100	47,449,192	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	1,515,035	1,391,742	123,293	0	0	1,515,035	0
HEALTH EDUCATION	638,934	310,340	218,694	86,900	23,000	638,934	0
COMMUNITY HLTH REPR	2,642,595	9,866	2,632,729	0	0	2,642,595	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	4,796,564	1,711,948	2,974,716	86,900	23,000	4,796,564	0
URBAN HEALTH	1,063,675	1,063,675	0	0	0	1,063,675	0
INDIAN HLTH PROFESSIONS	103,225	103,225	0	0	0	103,225	0
TRIBAL MANAGEMENT	1,275	1,275	0	0	0	1,275	0
DIRECT OPERATIONS	1,766,964	0	0	1,561,664	205,300	1,766,964	0
CONTRACT SUPPORT COSTS	2,316,477	378,109	1,938,368	0	0	2,316,477	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	57,497,372	41,081,906	8,882,302	6,454,764	1,078,400	57,497,372	0

42a

552

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: CALIFORNIA

BUDGET ACTIVITY	ADVICED TO AREA FY 1995 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1995 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	36,186,934	0	32,549,960	1,570,900	2,066,074	36,186,934	0
DENTAL	732,065	0	524,954	107,700	99,411	732,065	0
MENTAL HEALTH	915,350	0	822,105	64,500	28,745	915,350	0
ALCOHOL & SUB ABUSE	6,822,475	0	6,409,067	166,300	247,108	6,822,475	0
TOTAL CLIN'L SVCS	44,656,824	0	40,306,086	1,909,400	2,441,338	44,656,824	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	231,980	0	227,366	0	4,614	231,980	0
HEALTH EDUCATION	224,525	0	67,175	62,500	94,850	224,525	0
COMMUNITY HLTH REPR	1,391,400	0	1,380,459	0	10,941	1,391,400	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	1,847,905	0	1,675,000	62,500	110,405	1,847,905	0
URBAN HEALTH	4,076,450	92,659	3,983,791	0	0	4,076,450	0
INDIAN HLTH PROFESSIONS	26,570	0	0	0	26,570	26,570	0
TRIBAL MANAGEMENT	6,625	0	6,625	0	0	6,625	0
DIRECT OPERATIONS	1,094,575	0	0	699,000	395,575	1,094,575	0
CONTRACT SUPPORT COSTS	18,495,736	0	18,495,736	0	0	18,495,736	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	70,204,685	92,659	64,467,238	2,670,900	2,973,888	70,204,685	0

43a

553

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: NASHVILLE

BUDGET ACTIVITY	ADVICED TO AREA FY 1995 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1995 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	24,738,984	5,915,571	14,927,616	608,881	3,286,916	24,738,984	0
DENTAL	1,065,809	719,907	251,435	0	94,467	1,065,809	0
MENTAL HEALTH	862,461	82,686	638,397	27,761	113,617	862,461	0
ALCOHOL & SUB ABUSE	4,869,186	1,728,225	2,806,153	5,202	329,606	4,869,186	0
TOTAL CLIN'L SVCS	31,536,440	8,446,389	18,623,601	641,844	3,824,606	31,536,440	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	328,642	181,547	138,456	0	8,639	328,642	0
HEALTH EDUCATION	281,113	107,926	50,929	0	122,258	281,113	0
COMMUNITY HLTH REPR	1,811,371	0	1,800,416	0	10,955	1,811,371	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	2,421,126	289,473	1,989,801	0	141,852	2,421,126	0
URBAN HEALTH	591,100	0	586,500	0	4,600	591,100	0
INDIAN HLTH PROFESSIONS	6,300	0	0	0	6,300	6,300	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,344,759	1,400	(0)	556,796	786,563	1,344,759	0
CONTRACT SUPPORT COSTS	8,897,176	0	8,897,176	0	0	8,897,176	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	44,796,901	8,737,262	30,097,078	1,198,640	4,763,921	44,796,901	0

44a

554

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: NAVAJO

BUDGET ACTIVITY	ADVICED TO AREA FY 1995	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1995 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	113,819,279	108,174,979	2,599,000	0	3,045,300	113,819,279	0
DENTAL	11,781,100	11,241,100	0	0	540,000	11,781,100	0
MENTAL HEALTH	4,939,400	4,546,400	303,400	0	89,600	4,939,400	0
ALCOHOL & SUB ABUSE	10,545,760	488,000	10,057,760	0	0	10,545,760	0
TOTAL CLIN'L SVCS	141,085,539	124,450,479	12,960,160	0	3,674,900	141,085,539	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	5,489,700	4,831,700	499,400	0	158,600	5,489,700	0
HEALTH EDUCATION	1,045,300	0	1,045,300	0	0	1,045,300	0
COMMUNITY HLTH REPR	5,331,150	0	5,331,150	0	0	5,331,150	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	11,866,150	4,831,700	6,875,850	0	158,600	11,866,150	0
URBAN HEALTH	261,200	0	261,200	0	0	261,200	0
INDIAN HLTH PROFESSIONS	63,250	63,250	0	0	0	63,250	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	2,544,725	0	0	0	2,544,725	2,544,725	0
CONTRACT SUPPORT COSTS	3,933,057	0	3,933,057	0	0	3,933,057	0
OFFICE OF TRIBAL SELF-GOVN	2,400	0	0	0	2,400	2,400	0
						0	0
TOTAL SVCS APPROPR	159,756,321	129,345,429	24,030,267	0	6,380,625	159,756,321	0

45a

555

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: OKLAHOMA

BUDGET ACTIVITY	ADVICED TO AREA FY 1995 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1995 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	97,443,486	62,980,795	25,522,841	1,953,584	6,986,266	97,443,486	0
DENTAL	7,640,823	5,557,142	1,742,204	3,747	337,730	7,640,823	0
MENTAL HEALTH	3,057,884	2,054,713	634,381	6,413	362,377	3,057,884	0
ALCOHOL & SUB ABUSE	5,187,036	303,000	4,585,429	13,251	285,356	5,187,036	0
TOTAL CLIN'L SVCS	113,329,229	70,895,650	32,484,855	1,976,995	7,971,729	113,329,229	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	1,625,627	1,169,214	371,352	0	85,061	1,625,627	0
HEALTH EDUCATION	545,178	321,761	115,892	0	107,525	545,178	0
COMMUNITY HLTH REPR	3,590,233	0	3,569,663	0	20,570	3,590,233	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	5,761,038	1,490,975	4,056,907	0	213,156	5,761,038	0
URBAN HEALTH	1,099,400	0	1,099,400	0	0	1,099,400	0
INDIAN HLTH PROFESSIONS	91,775	91,775	0	0	0	91,775	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	2,462,209	0	0	928,341	1,533,868	2,462,209	0
CONTRACT SUPPORT COSTS	5,572,678	0	5,572,678	0	0	5,572,678	0
OFFICE OF TRIBAL SELF-GOVN	3,500	0	0	0	3,500	3,500	0
						0	0
TOTAL SVCS APPROPR	128,319,829	72,478,400	43,213,840	2,905,336	9,722,253	128,319,829	0

464

556

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: PHOENIX

BUDGET ACTIVITY	ADVICED TO AREA FY 1995 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1995 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	80,970,600	64,910,337	6,421,550	0	9,638,713	80,970,600	0
DENTAL	4,973,482	568,000	55,574	0	4,349,908	4,973,482	0
MENTAL HEALTH	3,666,691	0	1,121,563	0	2,545,128	3,666,691	0
ALCOHOL & SUB ABUSE	8,101,969	1,403,869	4,122,077	0	2,576,023	8,101,969	0
TOTAL CLIN'L SVCS	97,712,742	66,882,206	11,720,764	0	19,109,772	97,712,742	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	3,392,529	0	384,747	0	3,007,782	3,392,529	0
HEALTH EDUCATION	985,708	0	237,231	0	748,477	985,708	0
COMMUNITY HLTH REPR	4,492,362	0	4,474,382	0	17,980	4,492,362	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	8,870,599	0	5,096,360	0	3,774,239	8,870,599	0
URBAN HEALTH	1,345,150	0	1,345,150	0	0	1,345,150	0
INDIAN HLTH PROFESSIONS	37,506	0	0	0	37,506	37,506	0
TRIBAL MANAGEMENT	2,200	0	0	0	2,200	2,200	0
DIRECT OPERATIONS	2,461,924	0	0	0	2,461,924	2,461,924	0
CONTRACT SUPPORT COSTS	4,965,526	0	4,965,526	0	0	4,965,526	0
OFFICE OF TRIBAL SELF-GOVN	4,025	0	0	0	4,025	4,025	0
						0	0
TOTAL SVCS APPROPR	115,399,672	66,882,206	23,127,800	0	25,389,666	115,399,672	0

47a

557

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: PORTLAND

BUDGET ACTIVITY	ADVICED TO AREA FY 1995	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1995 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	33,184,835	13,466,857	14,455,878	1,092,100	4,170,000	33,184,835	0
DENTAL	4,139,502	2,427,925	1,425,672	82,400	203,505	4,139,502	0
MENTAL HEALTH	2,340,380	1,054,052	1,132,940	70,300	83,088	2,340,380	0
ALCOHOL & SUB ABUSE	7,072,584	14,000	7,058,584	0	0	7,072,584	0
TOTAL CLIN'L SVCS	46,737,301	16,962,834	24,073,074	1,244,800	4,456,593	46,737,301	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	1,718,924	1,272,570	358,866	0	87,488	1,718,924	0
HEALTH EDUCATION	602,375	170,792	359,583	72,000	0	602,375	0
COMMUNITY HLTH REPR	2,738,771	0	2,738,771	0	0	2,738,771	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	5,060,070	1,443,362	3,457,220	72,000	87,488	5,060,070	0
URBAN HEALTH	3,318,900	0	3,318,900	0	0	3,318,900	0
INDIAN HLTH PROFESSIONS	18,500	0	18,500	0	0	18,500	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,684,275	0	1,075	623,000	1,060,200	1,684,275	0
CONTRACT SUPPORT COSTS	13,855,796	0	13,855,796	0	0	13,855,796	0
OFFICE OF TRIBAL SELF-GOVN	13,500	0	13,500	0	0	13,500	0
						0	0
TOTAL SVCS APPROPR	70,688,342	18,406,196	44,738,065	1,939,800	5,604,281	70,688,342	0

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: TUCSON

BUDGET ACTIVITY	ADVICED TO AREA FY 1995	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1995 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	12,464,521	7,839,088	825,500	0	3,799,933	12,464,521	0
DENTAL	741,600	741,600	0	0	0	741,600	0
MENTAL HEALTH	808,200	128,069	484,032	0	196,099	808,200	0
ALCOHOL & SUB ABUSE	2,039,159	0	1,254,445	0	784,714	2,039,159	0
TOTAL CLIN'L SVCS	16,053,480	8,708,757	2,563,977	0	4,780,746	16,053,480	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	430,000	430,000	0	0	0	430,000	0
HEALTH EDUCATION	61,800	61,800	0	0	0	61,800	0
COMMUNITY HLTH REPR	1,581,250	69,450	1,511,800	0	0	1,581,250	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	2,073,050	561,250	1,511,800	0	0	2,073,050	0
URBAN HEALTH	297,075	0	0	0	297,075	297,075	0
INDIAN HLTH PROFESSIONS	1,900	0	0	0	1,900	1,900	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,128,541	0	0	0	1,128,541	1,128,541	0
CONTRACT SUPPORT COSTS	999,837	0	999,837	0	0	999,837	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	20,553,883	9,270,007	5,075,614	0	6,208,262	20,553,883	0

49a

559

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: HQE-ROCKVILLE

BUDGET ACTIVITY	ADVICED TO AREA FY 1995 (1)	FEDERAL SVC UNITS (2)	TRIBAL/URBAN PROGRAMS (3)	HEADQUARTERS RESIDUAL (4)	HEADQUARTERS NON-RESIDUAL (5)	FY 1995 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	53,310,539	0	0	0	53,310,539	53,310,539	0
DENTAL	166,551	0	0	0	166,551	166,551	0
MENTAL HEALTH	619,000	0	0	0	619,000	619,000	0
ALCOHOL & SUB ABUSE	1,352,924	0	0	0	1,352,924	1,352,924	0
TOTAL CLIN'L SVCS	55,449,014	0	0	0	55,449,014	55,449,014	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	3,987	0	0	0	3,987	3,987	0
HEALTH EDUCATION	159,397	0	0	0	159,397	159,397	0
COMMUNITY HLTH REPR	391,446	0	0	0	391,446	391,446	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	554,830	0	0	0	554,830	554,830	0
URBAN HEALTH	7,371,167	0	6,764,992	0	606,175	7,371,167	0
INDIAN HLTH PROFESSIONS	26,743,900	0	0	0	26,743,900	26,743,900	0
TRIBAL MANAGEMENT	5,035,966	0	5,035,966	0	0	5,035,966	0
DIRECT OPERATIONS	22,950,763	0	0	10,004,884	12,945,879	22,950,763	0
CONTRACT SUPPORT COSTS	320,192	0	320,192	0	0	320,192	0
OFFICE OF TRIBAL SELF-GOVN	180,040,517	0	179,504,217	0	536,300	180,040,517	0
						0	0
TOTAL SVCS APPROPR	298,466,349	0	191,625,367	10,004,884	96,836,098	298,466,349	0

50a

560

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1995

AREA: HQW-ALBUQ/NAT'L PROGRAMS

BUDGET ACTIVITY	ADVICED TO AREA FY 1995	FEDERAL SVC UNITS	TRIBAL/URBAN PROGRAMS	HEADQUARTERS		FY 1995 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	8,372,309	0	0	0	8,372,309	8,372,309	0
DENTAL	373,000	0	0	0	373,000	373,000	0
MENTAL HEALTH	964,333	0	0	0	964,333	964,333	0
ALCOHOL & SUB ABUSE	1,340,049	0	0	0	1,340,049	1,340,049	0
TOTAL CLIN'L SVCS	11,049,691	0	0	0	11,049,691	11,049,691	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	0	0	0	0	0	0	0
HEALTH EDUCATION	2,000	0	0	0	2,000	2,000	0
COMMUNITY HLTH REPR	0	0	0	0	0	0	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	2,000	0	0	0	2,000	2,000	0
URBAN HEALTH	0	0	0	0	0	0	0
INDIAN HLTH PROFESSIONS	0	0	0	0	0	0	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,496,600	0	0	0	1,496,600	1,496,600	0
CONTRACT SUPPORT COSTS	0	0	0	0	0	0	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	12,548,291	0	0	0	12,548,291	12,548,291	0

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

IHS SUMMARY

BUDGET ACTIVITY	ADVICED TO AREA FY 1996 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1996 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	753,626,138	439,776,178	181,926,158	15,064,240	116,859,562	753,626,138	0
DENTAL	51,817,127	33,603,420	6,811,544	270,547	11,131,616	51,817,127	0
MENTAL HEALTH	31,955,234	14,291,724	7,272,192	415,176	9,976,142	31,955,234	0
ALCOHOL & SUB ABUSE	77,967,648	4,786,276	55,528,725	1,038,705	16,613,942	77,967,648	0
TOTAL CLIN'L SVCS	915,366,147	492,457,598	251,538,619	16,788,668	154,581,262	915,366,147	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	21,388,474	12,185,893	4,205,412	0	4,997,169	21,388,474	0
HEALTH EDUCATION	6,769,753	1,326,815	3,023,136	160,600	2,259,202	6,769,753	0
COMMUNITY HLTH REPR	34,814,997	157,156	31,823,955	0	2,833,886	34,814,997	0
IMMUNIZATION	918,954	733,729	0	0	185,225	918,954	0
TOTAL PREVENTIVE HLTH	63,892,178	14,403,593	39,052,503	160,600	10,275,482	63,892,178	0
URBAN HEALTH	23,768,000	56,797	22,800,203	0	911,000	23,768,000	0
INDIAN HLTH PROFESSIONS	26,244,000	186,775	800	0	26,056,425	26,244,000	0
TRIBAL MANAGEMENT	2,348,000	0	2,332,225	0	15,775	2,348,000	0
DIRECT OPERATIONS	42,970,296	0	337,177	19,040,353	23,592,766	42,970,296	0
CONTRACT SUPPORT COSTS	89,070,819	0	89,070,819	0	0	89,070,819	0
OFFICE OF TRIBAL SELF-GOVN	211,585,560	0	211,077,960	0	507,600	211,585,560	0
						0	0
TOTAL SVCS APPROPR	1,375,245,000	507,104,763	616,210,306	35,989,621	215,940,310	1,375,245,000	0
							0

52a

562

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREAS ONLY

BUDGET ACTIVITY	ADVICED TO AREA FY 1996 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1996 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	690,248,871	439,776,178	181,926,158	14,020,869	54,525,666	690,248,871	0
DENTAL	51,370,796	33,603,420	6,811,544	270,547	10,685,285	51,370,796	0
MENTAL HEALTH	30,590,839	14,291,724	7,272,192	415,176	8,611,747	30,590,839	0
ALCOHOL & SUB ABUSE	75,952,586	4,786,276	55,528,725	1,038,705	14,598,880	75,952,586	0
TOTAL CLIN'L SVCS	848,163,092	492,457,598	251,538,619	15,745,297	88,421,578	848,163,092	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	21,362,682	12,185,893	4,205,412	0	4,971,377	21,362,682	0
HEALTH EDUCATION	6,570,553	1,326,815	3,023,136	160,600	2,060,002	6,570,553	0
COMMUNITY HLTH REPR	34,712,822	157,156	31,823,955	0	2,731,711	34,712,822	0
IMMUNIZATION	918,954	733,729	0	0	185,225	918,954	0
TOTAL PREVENTIVE HLTH	63,565,011	14,403,593	39,052,503	160,600	9,948,315	63,565,011	0
URBAN HEALTH	16,366,850	56,797	16,004,353	0	305,700	16,366,850	0
INDIAN HLTH PROFESSIONS	505,330	186,775	800	0	317,755	505,330	0
TRIBAL MANAGEMENT	25,600	0	11,000	0	14,600	25,600	0
DIRECT OPERATIONS	20,302,201	0	337,177	6,220,601	13,744,423	20,302,201	0
CONTRACT SUPPORT COSTS	89,070,819	0	89,070,819	0	0	89,070,819	0
OFFICE OF TRIBAL SELF-GOVN	71,396,152	0	71,320,827	0	75,325	71,396,152	0
						0	0
TOTAL SVCS APPROPR	1,109,395,055	507,104,763	467,336,098	22,126,498	112,827,696	1,109,395,055	0

53a

563

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

HDQTRS ONLY

BUDGET ACTIVITY	ADVICED TO AREA FY 1996 (1)	FEDERAL SVC UNITS (2)	TRIBAL/URBAN PROGRAMS (3)	HEADQUARTERS RESIDUAL (4)	HEADQUARTERS NON-RESIDUAL (5)	FY 1996 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	63,377,267	0	0	1,043,371	62,333,896	63,377,267	0
DENTAL	446,331	0	0	0	446,331	446,331	0
MENTAL HEALTH	1,364,395	0	0	0	1,364,395	1,364,395	0
ALCOHOL & SUB ABUSE	2,015,062	0	0	0	2,015,062	2,015,062	0
TOTAL CLIN'L SVCS	67,203,055	0	0	1,043,371	66,159,684	67,203,055	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	25,792	0	0	0	25,792	25,792	0
HEALTH EDUCATION	199,200	0	0	0	199,200	199,200	0
COMMUNITY HLTH REPR	102,175	0	0	0	102,175	102,175	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	327,167	0	0	0	327,167	327,167	0
URBAN HEALTH	7,401,150	0	6,795,850	0	605,300	7,401,150	0
INDIAN HLTH PROFESSIONS	25,738,670	0	0	0	25,738,670	25,738,670	0
TRIBAL MANAGEMENT	2,322,400	0	2,321,225	0	1,175	2,322,400	0
DIRECT OPERATIONS	22,668,095	0	0	12,819,752	9,848,343	22,668,095	0
CONTRACT SUPPORT COSTS	0	0	0	0	0	0	0
OFFICE OF TRIBAL SELF-GOVN	140,189,408	0	139,757,133	0	432,275	140,189,408	0
						0	0
TOTAL SVCS APPROPR	265,849,945	0	148,874,208	13,863,123	103,112,614	265,849,945	0

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: ABERDEEN

BUDGET ACTIVITY	ADVICED TO AREA FY 1996 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	1/ AREA OFFICE RESIDUAL (4)	1/ AREA OFFICE NON-RESIDUAL (5)	FY 1996 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	79,869,364	58,778,009	12,213,821	0	8,877,534	79,869,364	0
DENTAL	6,601,800	5,748,113	548,714	0	304,973	6,601,800	0
MENTAL HEALTH	5,826,600	3,416,312	462,278	0	1,948,010	5,826,600	0
ALCOHOL & SUB ABUSE	8,225,400	339,297	6,169,257	0	1,716,846	8,225,400	0
TOTAL CLIN'L SVCS	100,523,164	68,281,731	19,394,070	0	12,847,363	100,523,164	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	3,680,600	3,041,800	621,800	0	17,000	3,680,600	0
HEALTH EDUCATION	937,900	320,682	603,945	0	13,273	937,900	0
COMMUNITY HLTH REPR	5,304,539	0	5,289,504	0	15,035	5,304,539	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	9,923,039	3,362,482	6,515,249	0	45,308	9,923,039	0
URBAN HEALTH	797,425	1,125	796,300	0	0	797,425	0
INDIAN HLTH PROFESSIONS	92,000	0	0	0	92,000	92,000	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,960,250	0	0	0	1,960,250	1,960,250	0
CONTRACT SUPPORT COSTS	7,225,500	0	7,225,500	0	0	7,225,500	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	120,521,378	71,645,338	33,931,119	0	14,944,921	120,521,378	0

1/ The Aberdeen Area established residual through tribal consultation for FY1997 tribal shares negotiations.

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: ALASKA

BUDGET ACTIVITY	ADVICED TO AREA FY 1996 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1996 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	85,803,975	35,912,501	39,612,865	1,912,220	8,366,389	85,803,975	0
DENTAL	3,806,109	1,919,553	1,707,230	0	179,326	3,806,109	0
MENTAL HEALTH	1,521,649	765,444	216,784	0	539,421	1,521,649	0
ALCOHOL & SUB ABUSE	4,379,991	863,441	3,252,031	0	264,519	4,379,991	0
TOTAL CLIN'L SVCS	95,511,724	39,460,939	44,788,910	1,912,220	9,349,655	95,511,724	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	311,765	225,218	12,663	0	73,884	311,765	0
HEALTH EDUCATION	251,769	174,567	31,239	0	45,963	251,769	0
COMMUNITY HLTH REPR	551,241	134,162	409,543	0	7,536	551,241	0
IMMUNIZATION	918,954	733,729	0	0	185,225	918,954	0
TOTAL PREVENTIVE HLTH	2,033,729	1,267,676	453,445	0	312,608	2,033,729	0
URBAN HEALTH	0	0	0	0	0	0	0
INDIAN HLTH PROFESSIONS	11,755	0	0	0	11,755	11,755	0
TRIBAL MANAGEMENT	1,925	0	0	0	1,925	1,925	0
DIRECT OPERATIONS	2,307,209	0	27,600	0	2,279,609	2,307,209	0
CONTRACT SUPPORT COSTS	12,254,942	0	12,254,942	0	0	12,254,942	0
OFFICE OF TRIBAL SELF-GOVN	71,384,727	0	71,314,727	0	70,000	71,384,727	0
						0	0
TOTAL SVCS APPROPR	183,506,011	40,728,615	128,839,624	1,912,220	12,025,552	183,506,011	0

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: ALBUQUERQUE

BUDGET ACTIVITY	ADVICED TO AREA FY 1996 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1996 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	44,546,956	34,676,465	4,681,835	1,275,000	3,913,656	44,546,956	0
DENTAL	4,337,600	0	0	0	4,337,600	4,337,600	0
MENTAL HEALTH	2,781,100	0	0	0	2,781,100	2,781,100	0
ALCOHOL & SUB ABUSE	7,590,500	0	0	0	7,590,500	7,590,500	0
TOTAL CLIN'L SVCS	59,256,156	34,676,465	4,681,835	1,275,000	18,622,856	59,256,156	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	1,863,900	0	0	0	1,863,900	1,863,900	0
HEALTH EDUCATION	814,900	0	0	0	814,900	814,900	0
COMMUNITY HLTH REPR	2,568,000	0	0	0	2,568,000	2,568,000	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	5,246,800	0	0	0	5,246,800	5,246,800	0
URBAN HEALTH	484,925	0	484,925	0	0	484,925	0
INDIAN HLTH PROFESSIONS	48,000	0	0	0	48,000	48,000	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,142,275	0	0	150,000	992,275	1,142,275	0
CONTRACT SUPPORT COSTS	4,126,074	0	4,126,074	0	0	4,126,074	0
OFFICE OF TRIBAL SELF-GOVN	2,175	0	0	0	2,175	2,175	0
						0	0
TOTAL SVCS APPROPR	70,306,405	34,676,465	9,292,834	1,425,000	24,912,106	70,306,405	0

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: BEMIDJI

BUDGET ACTIVITY	ADVICED TO AREA FY 1996 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1996 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	31,589,161	7,644,577	21,986,056	392,400	1,566,128	31,589,161	0
DENTAL	1,549,909	705,208	785,804	0	58,897	1,549,909	0
MENTAL HEALTH	1,124,319	255,221	716,191	0	152,907	1,124,319	0
ALCOHOL & SUB ABUSE	5,133,585	0	4,743,433	147,900	242,252	5,133,585	0
TOTAL CLIN'L SVCS	39,396,974	8,605,006	28,231,484	540,300	2,020,184	39,396,974	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	608,613	0	608,613	0	0	608,613	0
HEALTH EDUCATION	245,720	0	127,774	0	117,946	245,720	0
COMMUNITY HLTH REPR	2,419,232	0	2,419,232	0	0	2,419,232	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	3,273,565	0	3,155,619	0	117,946	3,273,565	0
URBAN HEALTH	2,714,600	0	2,714,600	0	0	2,714,600	0
INDIAN HLTH PROFESSIONS	1,300	500	800	0	0	1,300	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	975,413	0	0	574,700	400,713	975,413	0
CONTRACT SUPPORT COSTS	6,212,200	0	6,212,200	0	0	6,212,200	0
OFFICE OF TRIBAL SELF-GOVN	2,500	0	2,500	0	0	2,500	0
						0	0
TOTAL SVCS APPROPR	52,576,552	8,605,506	40,317,203	1,115,000	2,538,843	52,576,552	0

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: BILLINGS

BUDGET ACTIVITY	ADVICED TO AREA FY 1996	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1996 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	37,330,421	31,256,611	1,646,010	3,611,400	816,400	37,330,421	0
DENTAL	3,329,769	3,211,843	12,426	84,400	21,100	3,329,769	0
MENTAL HEALTH	2,114,570	1,692,107	220,963	161,300	40,200	2,114,570	0
ALCOHOL & SUB ABUSE	5,666,202	1,252,549	3,413,753	800,400	199,500	5,666,202	0
TOTAL CLIN'L SVCS	48,440,962	37,413,110	5,293,152	4,657,500	1,077,200	48,440,962	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	1,639,830	1,230,984	408,846	0	0	1,639,830	0
HEALTH EDUCATION	621,174	284,536	225,338	89,100	22,200	621,174	0
COMMUNITY HLTH REPR	2,663,103	22,994	2,640,109	0	0	2,663,103	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	4,924,107	1,538,514	3,274,293	89,100	22,200	4,924,107	0
URBAN HEALTH	1,090,300	32	1,090,268	0	0	1,090,300	0
INDIAN HLTH PROFESSIONS	70,675	70,675	0	0	0	70,675	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,514,385	0	0	1,241,785	272,600	1,514,385	0
CONTRACT SUPPORT COSTS	2,314,194	0	2,314,194	0	0	2,314,194	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	58,354,623	39,022,331	11,971,907	5,988,385	1,372,000	58,354,623	0

59a

569

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: CALIFORNIA

BUDGET ACTIVITY	ADVICED TO AREA FY 1996	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1996 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	38,086,472	0	35,287,701	1,252,400	1,546,371	38,086,472	0
DENTAL	745,270	0	581,671	112,900	50,699	745,270	0
MENTAL HEALTH	961,694	0	891,694	70,000	0	961,694	0
ALCOHOL & SUB ABUSE	6,916,055	0	6,655,803	70,100	190,152	6,916,055	0
TOTAL CLIN'L SVCS	46,709,491	0	43,416,869	1,505,400	1,787,222	46,709,491	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	240,274	0	240,274	0	0	240,274	0
HEALTH EDUCATION	230,097	0	103,341	0	126,756	230,097	0
COMMUNITY HLTH REPR	1,457,668	0	1,455,974	0	1,694	1,457,668	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	1,928,039	0	1,799,589	0	128,450	1,928,039	0
URBAN HEALTH	4,186,550	55,640	4,130,910	0	0	4,186,550	0
INDIAN HLTH PROFESSIONS	14,350	0	0	0	14,350	14,350	0
TRIBAL MANAGEMENT	21,200	0	11,000	0	10,200	21,200	0
DIRECT OPERATIONS	1,010,467	0	29,867	980,600	0	1,010,467	0
CONTRACT SUPPORT COSTS	18,697,000	0	18,697,000	0	0	18,697,000	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	72,567,097	55,640	68,085,235	2,486,000	1,940,222	72,567,097	0

60a

570

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: NASHVILLE

BUDGET ACTIVITY	ADVICED TO AREA FY 1996	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1996 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	24,299,045	5,875,395	14,788,692	825,603	2,809,355	24,299,045	0
DENTAL	1,072,312	739,561	212,408	0	120,343	1,072,312	0
MENTAL HEALTH	860,917	91,753	689,108	37,642	42,414	860,917	0
ALCOHOL & SUB ABUSE	4,913,968	1,537,989	3,152,267	7,054	216,658	4,913,968	0
TOTAL CLIN'L SVCS	31,146,242	8,244,698	18,842,476	870,299	3,188,770	31,146,242	0
				0			
PREVENTIVE HEALTH				0			
PUBLIC HLTH NURSING	339,215	188,798	143,465	0	6,952	339,215	0
HEALTH EDUCATION	265,874	110,543	59,818	0	95,513	265,874	0
COMMUNITY HLTH REPR	2,134,690	0	2,128,785	0	5,905	2,134,690	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	2,739,779	299,341	2,332,068	0	108,370	2,739,779	0
				0			
URBAN HEALTH	603,050		602,000	0	1,050	603,050	0
INDIAN HLTH PROFESSIONS	1,100	0	0	0	1,100	1,100	0
TRIBAL MANAGEMENT	1,375	0	0	0	1,375	1,375	0
DIRECT OPERATIONS	1,367,328	0	31,381	754,979	580,968	1,367,328	0
CONTRACT SUPPORT COSTS	8,783,727	0	8,783,727	0	0	8,783,727	0
OFFICE OF TRIBAL SELF-GOVN	3,150	0	0	0	3,150	3,150	0
				0		0	0
TOTAL SVCS APPROPR	44,645,751	8,544,039	30,591,651	1,625,278	3,884,783	44,645,751	0

61a

571

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: NAVAJO

BUDGET ACTIVITY	ADVICED TO AREA FY 1996 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1996 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	122,351,591	115,540,486	2,994,405	0	3,816,700	122,351,591	0
DENTAL	12,394,000	11,825,830	0	0	568,170	12,394,000	0
MENTAL HEALTH	5,393,026	4,997,906	305,120	0	90,000	5,393,026	0
ALCOHOL & SUB ABUSE	10,744,162	490,000	10,254,162	0	0	10,744,162	0
TOTAL CLIN'L SVCS	150,882,779	132,854,222	13,553,687	0	4,474,870	150,882,779	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	5,552,719	4,971,200	510,519	0	71,000	5,552,719	0
HEALTH EDUCATION	1,121,548	0	1,121,548	0	0	1,121,548	0
COMMUNITY HLTH REPR	5,443,644	0	5,443,644	0	0	5,443,644	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	12,117,911	4,971,200	7,075,711	0	71,000	12,117,911	0
URBAN HEALTH	269,875	0	269,875	0	0	269,875	0
INDIAN HLTH PROFESSIONS	45,600	45,600	0	0	0	45,600	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	2,435,000	0	0	0	2,435,000	2,435,000	0
CONTRACT SUPPORT COSTS	3,847,500	0	3,847,500	0	0	3,847,500	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	169,598,665	137,871,022	24,746,773	0	6,980,870	169,598,665	0

62a

572

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: OKLAHOMA

BUDGET ACTIVITY	ADVICED TO AREA FY 1996	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1996 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	98,320,877	65,141,934	24,174,439	1,953,584	7,050,920	98,320,877	0
DENTAL	7,589,688	5,519,071	1,607,267	3,747	459,603	7,589,688	0
MENTAL HEALTH	3,081,651	2,135,358	583,894	6,413	355,986	3,081,651	0
ALCOHOL & SUB ABUSE	5,168,381	303,000	4,652,455	13,251	199,675	5,168,381	0
TOTAL CLIN'L SVCS	114,160,597	73,099,363	31,018,055	1,976,995	8,066,184	114,160,597	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	1,612,635	873,350	681,662	0	57,623	1,612,635	0
HEALTH EDUCATION	510,211	264,509	117,861	0	127,841	510,211	0
COMMUNITY HLTH REPR	3,344,011	0	3,339,801	0	4,210	3,344,011	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	5,466,857	1,137,859	4,139,324	0	189,674	5,466,857	0
URBAN HEALTH	1,128,200	0	1,128,200	0	0	1,128,200	0
INDIAN HLTH PROFESSIONS	45,600	45,600	0	0	0	45,600	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	2,403,543	0	0	928,341	1,475,202	2,403,543	0
CONTRACT SUPPORT COSTS	5,135,011	0	5,135,011	0	0	5,135,011	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	128,339,808	74,282,822	41,420,590	2,905,336	9,731,060	128,339,808	0

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: PHOENIX

BUDGET ACTIVITY	ADVICED TO AREA FY 1996	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1996 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	81,835,625	65,155,988	7,497,157	1,622,462	7,560,018	81,835,625	0
DENTAL	5,122,463	604,000	116,464	0	4,401,999	5,122,463	0
MENTAL HEALTH	3,705,718	0	1,183,208	65,021	2,457,489	3,705,718	0
ALCOHOL & SUB ABUSE	8,137,918	0	4,906,197	0	3,231,721	8,137,918	0
TOTAL CLIN'L SVCS	98,801,724	65,759,988	13,703,026	1,687,483	17,651,227	98,801,724	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	3,329,117	0	515,399	0	2,813,718	3,329,117	0
HEALTH EDUCATION	924,233	0	228,623	0	695,610	924,233	0
COMMUNITY HLTH REPR	4,437,345	0	4,426,345	0	11,000	4,437,345	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	8,690,695	0	5,170,367	0	3,520,328	8,690,695	0
URBAN HEALTH	1,379,300	0	1,379,300	0	0	1,379,300	0
INDIAN HLTH PROFESSIONS	150,550	0	0	0	150,550	150,550	0
TRIBAL MANAGEMENT	1,100	0	0	0	1,100	1,100	0
DIRECT OPERATIONS	2,358,556	0	26,218	1,186,296	1,146,042	2,358,556	0
CONTRACT SUPPORT COSTS	4,965,714	0	4,965,714	0	0	4,965,714	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	116,347,639	65,759,988	25,244,625	2,873,779	22,469,247	116,347,639	0

64a

574

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: PORTLAND

BUDGET ACTIVITY	ADVICED TO AREA FY 1996 (1)	FEDERAL SVC UNITS (2)	TRIBAL SVC UNITS (3)	AREA OFFICE RESIDUAL (4)	AREA OFFICE NON-RESIDUAL (5)	FY 1996 AREA TOTAL (6)	DIFFERENCE FROM ADVICED (7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	33,560,494	12,182,452	16,238,736	1,175,800	3,963,506	33,560,494	0
DENTAL	4,067,076	2,575,441	1,239,560	69,500	182,575	4,067,076	0
MENTAL HEALTH	2,436,895	798,078	1,555,529	74,800	8,488	2,436,895	0
ALCOHOL & SUB ABUSE	7,074,924	0	7,074,924	0		7,074,924	0
TOTAL CLIN'L SVCS	47,139,389	15,555,971	26,108,749	1,320,100	4,154,569	47,139,389	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	1,751,214	1,221,743	462,171	0	67,300	1,751,214	0
HEALTH EDUCATION	590,327	115,178	403,649	71,500	0	590,327	0
COMMUNITY HLTH REPR	2,742,849	0	2,742,849	0	0	2,742,849	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	5,084,390	1,336,921	3,608,669	71,500	67,300	5,084,390	0
URBAN HEALTH	3,407,975	0	3,407,975	0	0	3,407,975	0
INDIAN HLTH PROFESSIONS	24,400	24,400	0	0	0	24,400	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	1,870,469	0	222,111	403,900	1,244,458	1,870,469	0
CONTRACT SUPPORT COSTS	14,509,157	0	14,509,157	0	0	14,509,157	0
OFFICE OF TRIBAL SELF-GOVN	3,600	0	3,600	0	0	3,600	0
						0	0
TOTAL SVCS APPROPR	72,039,380	16,917,292	47,860,261	1,795,500	5,466,327	72,039,380	0

658

575

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: TUCSON

BUDGET ACTIVITY	ADVICED TO AREA FY 1996	FEDERAL SVC UNITS	TRIBAL SVC UNITS	AREA OFFICE		FY 1996 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	12,654,890	7,611,760	804,441	0	4,238,689	12,654,890	0
DENTAL	754,800	754,800	0	0	0	754,800	0
MENTAL HEALTH	782,700	139,545	447,423	0	195,732	782,700	0
ALCOHOL & SUB ABUSE	2,001,500	0	1,254,443	0	747,057	2,001,500	0
TOTAL CLIN'L SVCS	16,193,890	8,506,105	2,506,307	0	5,181,478	16,193,890	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	432,800	432,800	0	0	0	432,800	0
HEALTH EDUCATION	56,800	56,800	0	0	0	56,800	0
COMMUNITY HLTH REPR	1,646,500	0	1,528,169	0	118,331	1,646,500	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	2,136,100	489,600	1,528,169	0	118,331	2,136,100	0
URBAN HEALTH	304,650	0	0	0	304,650	304,650	0
INDIAN HLTH PROFESSIONS	0	0	0	0	0	0	0
TRIBAL MANAGEMENT	0	0	0	0	0	0	0
DIRECT OPERATIONS	957,306	0	0	0	957,306	957,306	0
CONTRACT SUPPORT COSTS	999,800	0	999,800	0	0	999,800	0
OFFICE OF TRIBAL SELF-GOVN	0	0	0	0	0	0	0
						0	0
TOTAL SVCS APPROPR	20,591,746	8,995,705	5,034,276	0	6,561,765	20,591,746	0

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: HQE-ROCKVILLE

BUDGET ACTIVITY	ADVICED TO AREA FY 1996	FEDERAL SVC UNITS	TRIBAL/URBAN PROGRAMS	HEADQUARTERS		FY 1996 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	54,909,638	0	0	0	54,909,638	54,909,638	0
DENTAL	119,331	0	0	0	119,331	119,331	0
MENTAL HEALTH	544,975	0	0	0	544,975	544,975	0
ALCOHOL & SUB ABUSE	1,005,317	0	0	0	1,005,317	1,005,317	0
TOTAL CLIN'L SVCS	56,579,261	0	0	0	56,579,261	56,579,261	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	25,792	0	0	0	25,792	25,792	0
HEALTH EDUCATION	199,200	0	0	0	199,200	199,200	0
COMMUNITY HLTH REPR	102,175	0	0	0	102,175	102,175	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	327,167	0	0	0	327,167	327,167	0
URBAN HEALTH	7,401,150	0	6,795,850	0	605,300	7,401,150	0
INDIAN HLTH PROFESSIONS	25,738,670	0	0	0	25,738,670	25,738,670	0
TRIBAL MANAGEMENT	2,321,225	0	2,321,225	0	0	2,321,225	0
DIRECT OPERATIONS	21,250,655	0	0	12,819,752	8,430,903	21,250,655	0
CONTRACT SUPPORT COSTS	0	0	0	0	0	0	0
OFFICE OF TRIBAL SELF-GOVN	140,181,433	0	139,757,133	0	424,300	140,181,433	0
						0	0
TOTAL SVCS APPROPR	253,799,561	0	148,874,208	12,819,752	92,105,601	253,799,561	0

67a

577

ALLOCATION OF INDIAN HEALTH SERVICES APPROPRIATION BY BUDGET ACTIVITY

FY 1996

AREA: HQW-ALBUQ/NAT'L PROGRAMS

BUDGET ACTIVITY	ADVICED TO AREA FY 1996	FEDERAL SVC UNITS	TRIBAL/URBAN PROGRAMS	HEADQUARTERS		FY 1996 AREA TOTAL	DIFFERENCE FROM ADVICED
				RESIDUAL	NON-RESIDUAL		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
CLINICAL SERVICES							
HOSPITALS & CLINICS	8,467,629	0	0	1,043,371	7,424,258	8,467,629	0
DENTAL	327,000	0	0	0	327,000	327,000	0
MENTAL HEALTH	819,420	0	0	0	819,420	819,420	0
ALCOHOL & SUB ABUSE	1,009,745	0	0	0	1,009,745	1,009,745	0
TOTAL CLIN'L SVCS	10,623,794	0	0	1,043,371	9,580,423	10,623,794	0
PREVENTIVE HEALTH							
PUBLIC HLTH NURSING	0	0	0	0	0	0	0
HEALTH EDUCATION	0	0	0	0	0	0	0
COMMUNITY HLTH REPR	0	0	0	0	0	0	0
IMMUNIZATION	0	0	0	0	0	0	0
TOTAL PREVENTIVE HLTH	0	0	0	0	0	0	0
URBAN HEALTH	0	0	0	0	0	0	0
INDIAN HLTH PROFESSIONS	0	0	0	0	0	0	0
TRIBAL MANAGEMENT	1,175	0	0	0	1,175	1,175	0
DIRECT OPERATIONS	1,417,440	0	0	0	1,417,440	1,417,440	0
CONTRACT SUPPORT COSTS	0	0	0	0	0	0	0
OFFICE OF TRIBAL SELF-GOVN	7,975	0	0	0	7,975	7,975	0
						0	0
TOTAL SVCS APPROPR	12,050,384	0	0	1,043,371	11,007,013	12,050,384	0

(10) (8)

Nos. 02-1472 & 03-853

Supreme Court, U.S.
FILED
JUN 18 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHEROKEE NATION and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, *et al.*,
Respondents.

TOMMY G. THOMPSON,
Secretary of Health and Human Services,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth Circuit and for the Federal Circuit

OPENING BRIEF FOR CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES

CARTER G. PHILLIPS
STEPHEN B. KINNAIRD
HOWARD J. STANISLAWSKI
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LLOYD B. MILLER *
ARTHUR LAZARUS, JR., PC
HARRY R. SACHSE
WILLIAM R. PERRY
MELANIE B. OSBORNE
AARON M. SCHUTT
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for Cherokee Nation and Shoshone-Paiute Tribes

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, directs the Secretary of Health and Human Services to pay Indian tribal contractors operating federal medical facilities the necessary "contract support costs" required to operate those facilities, and establishes a damages remedy under the Contract Disputes Act for any contract breach. The ISDA further provides that the "provision of funds" under self-determination contracts is "subject to the availability of appropriations," and that in making funds available to contracting Tribes "the Secretary is not required to reduce programs, projects, or activities serving [any other] tribe," 25 U.S.C. 450j-1(b). In order to curb an agency practice of regularly underfunding such contracts, the ISDA also instructs that the contract amount "shall not be reduced" by the Secretary to pay for "Federal functions." *Id.*

1. Whether there were appropriations legally available in fiscal years 1994 to 1997 to fund the contracts here at issue in the amounts mandated by the ISDA, given that each year Congress enacted an unrestricted lump-sum appropriation to carry out the ISDA?

2. Whether a statutory directive that the Secretary is not required to reduce the funding of other tribes in making funds available to ISDA tribal contractors authorizes the Secretary to refuse to pay the contract amount mandated by statute rather than reprogram spending on Federal functions or spend unobligated appropriations?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are set forth in the petitions for writs of certiorari.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	4
1. The Indian Self-Determination And Education Assistance Act	4
2. The Relevant Appropriations Acts	11
3. IHS's Unauthorized And Non-Binding Procedures	13
4. Facts Pertaining To *Thompson*, No. 03-853 (FY1994-1996)	14
5. Facts Pertaining To *Cherokee Nation and Shoshone-Paiute Tribes*, No. 02-1472 (FY1996-1997)	16
6. The 1998 Rider "Section 314"	17
7. Proceedings Below	19
a. *Cherokee*, No. 02-1472	19
b. *Thompson*, No. 03-853	20
SUMMARY OF ARGUMENT	21
ARGUMENT	24

TABLE OF CONTENTS—Continued

	Page
I. THE SECRETARY'S FAILURE TO PAY WAS NOT EXCUSED BY THE ISDA'S "AVAILABILITY" CLAUSE	25
A. Appropriations Were Available As A Matter Of Law To Pay The Full Amount Of The ISDA Contracts, Including CSCs, In The Relevant Fiscal Years	25
B. The Tenth Circuit's Reformulation Of The "Availability" Clause Is Neither Plausible Nor Consistent with *Winstar*, *Lynch* And *Murray*	32
C. The ISD Funds In The Four Appropriations Acts Did Not Cap The Availability Of Appropriations To Pay CSCs For The Expanded Portions Of The Tribes' Contracts	35
D. Section 314 Did Not, And Could Not, Retroactively Alter The "Availability Of Appropriations" Years Earlier To Pay The Tribes' Contract Obligations	37
II. THE SECRETARY'S FAILURE TO PAY WAS NOT EXCUSED BY THE ISDA'S "REDUCTION" CLAUSE	42
CONCLUSION	50

TABLE OF AUTHORITIES

Cases	Page
Ass'n of Civilian Technicians v. FLRA, 269 F.3d 1112 (D.C. Cir. 2001)	26
AT&T v. Central Office Tel., Inc., 524 U.S. 214 (1998)	45
Bath Iron Works Corp. v. United States, 20 F.3d 1567 (Fed. Cir. 1994)	28, 50
Beverly Cmty. Hosp. Ass'n v. Belshe, 132 F.3d 1259 (9th Cir. 1997)	39
Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539 (Ct. Cl. 1980)	*passim*
Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41 (1986)	24, 40
Brown v. Marquette Sav. & Loan Ass'n, 686 F.2d 608 (7th Cir. 1982)	39
Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598 (2001)	26, 36
Callejas v. McMahon, 750 F.2d 729 (9th Cir. 1984)	39
Caminetti v. United States, 242 U.S. 470 (1917)	25
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	47
Cherokee Nation v. Thompson, 311 F.3d 1054 (10th Cir. 2002)	*passim*
Christensen v. Harris County, 529 U.S. 576 (2000)	23, 33
Cisneros v. Alpine Ridge Group, 508 U.S. 10 (1993)	45
DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988)	41
Delta Data Sys. Corp. v. Webster, 744 F.2d 197 (D.C. Cir. 1984)	26
Dougherty v. United States, 18 Ct. Cl. 496 (1883)	28

TABLE OF AUTHORITIES—Continued

	Page
Duncan v. Walker, 533 U.S. 167 (2001)	29
Ferris v. United States, 27 Ct. Cl. 542 (1892)	22, 28, 29, 30
FTC v. Morton Salt Co., 334 U.S. 37 (1948)	49
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988)	26, 36
Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000)	47
Holloway v. United States, 526 U.S. 1 (1999)	23, 24, 33, 45
Hooper v. California, 155 U.S. 648 (1895)	40
INS v. St. Cyr, 533 U.S. 289 (2001)	26, 36
Int'l Union v. Donovan, 746 F.2d 855 (D.C. Cir.1984)	26, 28, 31
Javierre v. Central Altagracia Inc., 217 U.S. 502 (1910)	47
Lee v. United States, 129 F.3d 1482 (Fed. Cir. 1997)	28, 50
Lincoln v. Vigil, 508 U.S. 182 (1993)	23, 26, 31, 32
Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887 (1st Cir. 1992)	39
Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990)	47
Lynch v. United States, 292 U.S. 571 (1934)	4, 32, 34, 40
Mass. Bay Transp. Auth. v. United States, 254 F.3d 1367 (Fed. Cir. 2001)	47
Mass. Dep't of Educ. v. United States Dep't of Education, 837 F.2d 536 (1st Cir. 1988)	36
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	48
McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984)	49
McGillin v. Bennett, 132 U.S. 445 (1889)	49
Miller v. French, 530 U.S. 327 (2000)	41

TABLE OF AUTHORITIES—Continued

	Page
Morissette v. United States, 342 U.S. 246 (1952)	26
Murray v. City of Charleston, 96 U.S. 432 (1877)	4, 23, 32, 35
Nat'l Ass'n of Reg. Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977)	36
NCNB Texas Nat'l Bank v. Cowden, 895 F.2d 1488 (5th Cir. 1990)	39
New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966)	28
N.Y. Cent. RR v. United States, 65 Ct. Cl. 115 (1928)	28
New Valley Corp. v. United States, 119 F.3d 1576 (Fed. Cir. 1997)	47
Ohler v. United States, 529 U.S. 753 (2000)	49
O'Gilvie v. United States, 519 U.S. 79 (1996)	24, 39
Paramount Health Sys., Inc. v. Wright, 138 F.3d 706 (7th Cir. 1998)	39
Perry v. United States, 294 U.S. 330 (1935)	40
Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272 (11th Cir. 1999)	39
Pierce County v. Guillen, 537 U.S. 129 (2003)	30, 45
Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)	41
Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997)	7
Ramah Navajo School Bd. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996)	*passim*
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	39
Robertson v. Seattle Audubon Soc., 503 U.S. 429 (1992)	41
Robinson v. Shell Oil Co., 519 U.S. 337 (1997)	24

TABLE OF AUTHORITIES—Continued

	Page
Ross Constr. Corp. v. United States, 392 F.2d 984 (Ct. Cl. 1968)	29
Rumsfeld v. United Tech., Corp., 315 F.3d 1361 (Fed. Cir. 2003)	7
Russello v. United States, 464 U.S. 16 (1983)	22, 29, 37
S.A. Healy Co. v. United States, 576 F.2d 299 (Ct. Cl. 1978)	46
Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980)	39
Shipman v. United States, 18 Ct. Cl. 138 (1883)	28
Shomberg v. United States, 348 U.S. 540 (1955)	45
Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala, 988 F. Supp. 1306 (D. Or. 1997), *modified* 999 F. Supp. 1395 (1998), *on remand*, 58 F. Supp. 2d 1191 (1999), *rev'd*, 279 F.3d 660 (9th Cir. 2002)	18, 38, 42
Sutton v. United States, 256 U.S. 575 (1921)	28, 29
Thompson v. Cherokee Nation, 334 F.3d 1075 (Fed. Cir. 2003)	*passim*
Train v. City of New York, 420 U.S. 35 (1975)	33
United States v. Am. Ry. Express Co., 265 U.S. 425 (1924)	49
United States v. Klein, 80 U.S. (13 Wall.) 128 (1871)	24, 40, 41
United States v. Larionoff, 431 U.S. 864 (1977)	40
United States v. Locke, 471 U.S. 84 (1985)	46
United States v. Mazurie, 419 U.S. 544 (1975)	44
United States v. Montgomery County, 761 F.2d 998 (4th Cir. 1985)	39
United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989)	24
United States v. Wilson, 503 U.S. 329 (1992)	38

TABLE OF AUTHORITIES—Continued

	Page
United States v. Winstar Corp., 518 U.S. 839 (1996)	*passim*
Wilson v. Watt, 703 F.2d 395 (9th Cir. 1983)	36
Constitution	
U.S. Const. art. I, § 9, cl. 7	21, 50
Statutes	
Anti-Deficiency Act, 31 U.S.C. 1341	2, 28
Contract Disputes Act, 41 U.S.C. 601-613	2
Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. 450-450n	2, 15
450a(b)	4
450b(f)	7
450b(g)	7
450b(i)	4
450b(j)	6, 9
450f(a)(1)	4, 5, 6, 25
450f(a)(2)	6
450f(a)(2)(D)	6, 43
450f(b)	6, 43
450f(b)(3)	47
450f(e)(1)	6, 47
450j(a)(1)	6
450j-1(a)	*passim*
450j-1(a)(2)	7, 25
450j-1(a)(3)	7, 25
450j-1(a)(3)(A)(i)	7
450j-1(a)(3)(A)(ii)	7
450j-1(a)(5)	7, 23, 25, 35
450j-1(b)	*passim*
450j-1(b)(1)	8, 44, 46

TABLE OF AUTHORITIES—Continued

	Page
450j-1(b)(2)	8
450j-1(b)(3)	8, 44, 46
450j-1(b)(4)	8, 44
450j-1(c)(2)	8, 46
450j-1(d)(2)	7
450j-1(g)	6, 25
450k(a)(1)	10, 13
450*l*(c)	9, 25, 33
450*l*(c) (sec. 1(a)(1))	9
450*l*(c) (sec. 1(a)(2))	9, 23, 34, 45
450*l*(c) (sec. 1(b)(2))	9
450*l*(c) (sec. 1(b)(4))	6, 9, 10, 25, 30
450*l*(c) (sec. 1(b)(6)(B)(i))	10
450*l*(c) (sec. 1(b)(11))	10
450*l*(c) (sec. 1(f)(2))	9
450m-1(a)	9, 19, 47, 50
450m-1(d)	9, 50
Title III, Pub. L. No. 100-472, § 209, 102 Stat. 2285 (1988), 25 U.S.C. 450f note (1988)	15
303(a)(6)	15
303(a)(9)	15
303(d)	15
303(e)	34
Title IV, Pub. L. No. 103-413, 108 Stat. 4272 (1994), 25 U.S.C. 458cc(*l*)	15
Title V, Pub. L. No. 106-260, 114 Stat. 711 (2000), 25 U.S.C. 458aaa *et seq.*	15
Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988)	5

TABLE OF AUTHORITIES—Continued

	Page
Indian Self-Determination and Education Assistance Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994)	5
Judgment Fund Act, 31 U.S.C. 1304	2, 21, 50
28 U.S.C. 1254(1)	2
31 U.S.C. 1552(a)	12, 18, 19, 38
31 U.S.C. 1553(a)	12, 18, 19, 38
Pub. L. No. 100-472, 102 Stat. 2285 (1988)	15
Pub. L. No. 103-138, 107 Stat. 1379 (1993)	11, 12, 25
Pub. L. No. 103-332, 108 Stat. 2499 (1994)	11
Pub. L. No. 103-413, 108 Stat. 4250 (1994)	5
Pub. L. No. 104-134, 110 Stat. 1321 (1996)	11, 12
Pub. L. No. 104-208, 110 Stat. 3009 (1996)	11
Pub. L. No. 105-83, 111 Stat. 1543 (1997)	12
Pub. L. No. 105-277, sec. 314, 112 Stat. 2681-288 (1998)	*passim*
Pub. L. No. 106-113, 113 Stat. 1501 (1999)	13, 38
Pub. L. No. 106-260, 114 Stat. 711 (2000)	15
Regulations	
25 C.F.R. § 900.3(a)(5)	34
25 C.F.R. § 900.5	13
Rules	
F.R.E. 201(d)	49
F.R.E. 201(f)	49
Legislative Materials	
H.R. Conf. Rep. No. 103-740 (1994)	44
H.R. Conf. Rep. No. 105-337 (1997)	29
H.R. Rep. No. 103-158 (1993)	45
H.R. Rep. No. 105-609 (1998)	33
H.R. Rep. No. 106-477 (1999)	44

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 100-274 (1987)	*passim*
S. Rep. No. 103-294 (1994)	44
S. Rep. No. 103-374 (1994)	10
S. Rep. No. 105-227 (1998)	19, 38
Comptroller General Opinions	
In re Hon. Brown, 64 Comp. Gen. 388 (1985)	30
In re Hon. Cochran, B-271607 (Comp. Gen. June 3, 1996)	36
In re Forest Service, B-231711, 1989 WL 240615 (Comp. Gen. Mar. 28, 1989)	35
In re Hon. Oxley, B-131935, 1986 WL 63785 (Comp. Gen. Mar. 17, 1986)	30
LTV Aerospace Corp., 55 Comp. Gen 307 (1975)	31
Other Authorities	
In re Alamo Navajo School Bd., Inc. & Miccosukee Corp., Nos. 3463-3466 & 3560-3562, 98-2 BCA ¶¶ 29,831 & 29,832, 1997 WL 759441 (IBCA Dec. 4, 1997), *appeal voluntarily dismissed in part sub nom. Babbitt v. Miccosukee Corp.*, 185 F.3d 880 (Fed. Cir. 1998) (unpub'd), *rev'd in part*, 217 F.3d 857 (Fed. Cir. 1999) (unpub'd), *cert. denied*, 530 U.S. 1203 (2000)	18
Indian Self-Determination Memorandum 92-2	13, 16, 42
Indian Health Service Circular 96-04	13, 42
Indian Health Service Circular 2001-05	14
Office of Management and Budget Circular A-11 (2003)	27

TABLE OF AUTHORITIES—Continued

	Page
Office of Management and Budget Circular A-34 (2000), *superceded by* Office of Management and Budget Circular A-11, Part 4 (2002)	26
Office of Management and Budget Circular A-87, 46 Fed. Reg. 9548 (Jan. 28, 1981)	7
Office of Management and Budget Policy Letter No. 92-1, 57 Fed. Reg. 45096 (Sept. 30, 1992)	44
Opinion of the Solicitor, Dep't of the Interior (May 17, 1996)	44
PRESIDENT'S BUDGET FOR FISCAL YEAR 1996 (Feb. 1995), Budget App. 471	12
PRESIDENT'S BUDGET FOR FISCAL YEAR 1997 (Jan. 1996), Budget App. 479	12
PRESIDENT'S BUDGET FOR FISCAL YEAR 1998 (Jan. 1997), Budget App. 500	12
PRESIDENT'S BUDGET FOR FISCAL YEAR 1999 (Jan. 1998), Budget App. 404	12
St. Regis Mohawk Tribe, DAB No. A-02-12, 2002 WL 125183 (DHHS Jan. 17, 2002)	43, 50
U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (2d. ed. 1991)	*passim*

IN THE

Supreme Court of the United States

Nos. 02-1472 & 03-853

CHEROKEE NATION and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, *et al.*,
Respondents.

TOMMY G. THOMPSON,
Secretary of Health and Human Services,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth Circuit and for the Federal Circuit

---

OPENING BRIEF FOR CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 311 F.3d 1054 and reprinted in No. 02-1472 at Pet. 1a. The District Court opinion is reported at 190 F. Supp. 2d 1248 and reprinted at Pet. 24a.

The opinion of the Court of Appeals for the Federal Circuit is reported at 334 F.3d 1075 and reprinted in No. 03-853 at

Pet. 1a. The relevant Interior Board of Contract Appeals (IBCA) opinions are reported at 01-1 B.C.A. (CCH) ¶ 31,349 and 99-2 B.C.A. (CCH) ¶ 30,462, and reprinted at Pet. 43a, 50a.

JURISDICTION

The judgment of the Court of Appeals in *Cherokee* was entered November 26, 2002, a petition for rehearing was denied January 22, 2003, and the petition for certiorari was filed April 3, 2003. The judgment of the Court of Appeals in *Thompson* was entered July 3, 2003, a petition for rehearing was denied September 12, 2003, and the petition for certiorari was filed December 11, 2003. In both cases this Court's jurisdiction is invoked under 28 U.S.C. 1254(1). The petitions were granted March 22, 2004, in an Order consolidating the cases for briefing and argument. 124 S. Ct. 1652.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), as amended, 25 U.S.C. 450-450n, the relevant Appropriations Acts, the Contract Disputes Act, 41 U.S.C. 601-613 (CDA), the Anti-Deficiency Act, 31 U.S.C. 1341 (ADA), and the Judgment Fund Act, 31 U.S.C. 1304, are reprinted in the Addendum hereto.

INTRODUCTION

In these consolidated cases the Secretary refused to pay two tribal contractors their "contract support costs" of operating Federal medical facilities, even though payment of such costs is a mandatory term of contracts under the amended ISDA "subject to the availability of appropriations," 25 U.S.C. 450j-1(b). As the Federal Circuit properly concluded in *Thompson*, under time-honored principles of Federal contracting and appropriations law there were ample appropriations available in fiscal years 1994 to 1997 to fund the contracts at issue in full. Each year Congress made a lump-sum appropriation that was far in excess of all ISDA

contract obligations: there was no statutory earmark, cap or other limitation specific to ISDA contracts (or contract support costs) that would even arguably render appropriations unavailable. The Secretary's later discretionary spending of each lump-sum appropriation on other items during the course of the fiscal year has nothing to do with "the availability of appropriations" as that term has long been interpreted; even if it did, by the plain terms of the relevant Appropriations Acts necessary amounts fully to support the contracts were obligated immediately upon the effective date of the Acts. Nor did a later appropriations rider passed in 1998, declaring that recommended earmarks in *committee reports* for the FY1994-1997 Appropriations Acts are the total amounts available for contract support costs in those years, have retroactive effect. That rider addresses only the future obligation of unexpended prior appropriations. The rider neither has nor could have retroactive effect because Congress can neither abrogate the Government's own contracts, nor issue an interpretation of prior unamended law that would bind a Federal court in an action for breach of contract under that prior law.

Finally, the Secretary cannot refuse to pay the full contractual amount mandated by statute by invoking the ISDA provision that the funding of self-determination contracts does not require the Secretary to reduce spending on programs serving other tribes: not only is that provision simply a grant of reprogramming discretion, but it provides no refuge for the Government when total Indian Health Service appropriations for each fiscal year are far in excess of the combined total spent on Federal services to Indian tribes and on ISDA contracts.

The Federal Circuit's decision holding the Government bound to its contracts is faithful to, indeed mandated by, the plain language and purpose of the ISDA, which was enacted in present form to cure a decade of abusive practices by the Secretary in negotiating and funding self-determination

contracts. By contrast, the Tenth Circuit's contrary ruling freeing the Government from its contractual obligations to pay contract support costs is irreconcilable with the text, structure, and history of the Act. It also presents a radical and unwarranted departure from established contracts and appropriations law that, if accepted, would ultimately inject untold destabilizing risks into the government contracting process, increase the costs of such contracts, and undermine the foundation of the Government's reliability as a contracting partner, contrary to the foundational principles set forth in *United States v. Winstar Corp.*, 518 U.S. 839 (1996); *Lynch v. United States*, 292 U.S. 571 (1934); and *Murray v. City of Charleston*, 96 U.S. 432 (1877).

STATEMENT OF THE CASE

1. The Indian Self-Determination And Education Assistance Act. Congress in the 1975 Indian Self-Determination and Education Assistance Act committed this Nation to "the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. 450a(b). To carry out this commitment, Congress required the Secretary to enter into contracts whereby Tribes would receive funding to take over the administration of Federal hospitals, clinics and other Federal programs that were otherwise being operated by the Secretary of Health and Human Services (through the Indian Health Service (IHS)), or the Secretary of the Interior (mainly through the Bureau of Indian Affairs (BIA)). 25 U.S.C. 450b(i), 450f(a)(1).

In the wake of the ISDA's enactment, Congress witnessed the "agencies' consistent failures . . . to administer self-determination contracts in conformity with the law," with the BIA and IHS "systematically violat[ing]" contractors' rights.

S. Rep. No. 100-274, at 37 (1987). Far and away "the single most serious problem with implementation of the Indian self-determination policy ha[d] been the failure of the [BIA] and [IHS] to provide funding for the indirect costs associated with self-determination contracts." *Id.* 8. This "practice . . . require[d] tribal contractors to absorb all or part of such indirect costs within the program level of funding, thus reducing the amount available to provide services to Indians as a direct consequence of contracting." *Id.* 33. *See also id.* 9-10 (discussing same). The agencies' failures to pay in full various contract "indirect costs" (later called "contract support costs" (or CSCs)) also resulted in a "tremendous drain on tribal financial resources," *id.* 7, because tribal contractors were compelled to "subsidize" the contracted programs, *id.* 9. Concerned that Tribes would soon "choose . . . to retrocede the contract[s] back to the Federal agency," *id.* 13, the Senate Indian Affairs Committee declared that "[IHS] must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services." *Id.* 12.

By the time of the facts giving rise to these cases, Congress had twice substantially rewritten the Act to constrain as much as possible the Secretary's contracting discretion, and to guarantee full funding of all contract costs, subject to the availability of appropriations. *See* Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988); Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994). Under the amended Act, "[t]he Secretary is directed, upon the request of any Indian tribe . . . to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof . . . [authorized under certain specified laws]." 25 U.S.C. 450f(a)(1). The Act further mandates that contractable functions "shall include administrative [DHHS] functions . . . that support the delivery of services to Indians"

"without regard to the organizational level within the Department that carries out such functions." *Id.* The Act also provides that "the Secretary shall, within ninety days after receipt of [a contracting] proposal, approve the proposal and award the contract unless the Secretary . . . [makes] a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that," certain 'declination' criteria have been triggered. § 450f(a)(2). It establishes as one such criterion any agency claim that "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under [§ 450j-1(a)]." § 450f(a)(2)(D). It establishes remedies to test any declination (§ 450f(b)), and in such proceedings directs that "the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal." § 450f(e)(1). And, it fully exempts ISDA tribal contracts from the federal procurement system. §§ 450b(j), 450j(a)(1).

With respect to contract funding, Congress meticulously provided in § 450j-1(g) that "[u]pon the approval of a self-determination contract, the Secretary *shall add to the contract* the full amount of funds to which the contractor is entitled under [subsection (a)]," and Congress commanded that the contract amount "*shall not be less than* the applicable amount determined pursuant to [subsection (a)]," § 450*l*(c) (sec. 1(b)(4)) (emphasis added). Subsection 450j-1(a), in turn, required that in addition to the "Secretarial amount"[1]—

> (2) There shall be added . . . contract support costs, which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management.

[1] The so-called "Secretarial amount" is the amount the Secretary would have spent directly to carry out the program being contracted. *Thompson*, Pet. 4a; *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1341 (D.C. Cir. 1996) ("*RNSB*").

See also §§ 450j-1(a)(2),(3) & (5) (describing the required CSCs that "shall be added" to the contract); 450j-1(d)(2) ("[n]othing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract"). These contract support costs cover:

> (1) a proportionate share of a contractor's total pooled "indirect costs" required to administer and support all of its operations, including its ISDA contract (§§ 450b(f), 450j-1(a)(3)(A)(ii));[2] and
>
> (2) certain unpooled "direct" CSC costs, such as workers' compensation insurance, that specifically support only the ISDA contract (§ 450j-1(a)(3)(A)(i)).

The described CSCs cover the "fixed" overhead costs tribal contractors must incur to carry out these federal contracts, S. Rep. No. 100-274, at 11; *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997), costs which if unreimbursed must either be paid by a contractor or absorbed by

[2] "Indirect costs" are necessary pooled overhead costs (such as personnel, procurement and financial management systems costs) that benefit all of a contractor's operations, including the ISDA-contracted portion of those operations. Office of Management and Budget (OMB) Circular A-87, 46 Fed. Reg. 9548 (Jan. 28, 1981) (explaining costs and process). Indirect costs are typically expressed as a "rate." *See* 25 U.S.C. 450b(g) (defining "indirect cost rate"). The indirect cost rate is "predetermined" by the contractor's appropriate Federal agency, *Thompson*, Pet. 7a-8a n.2 (discussing OMB Cir. A-87); 53a (explaining process). Such cost allocation systems are a common feature of government contracts. *E.g.*, *Rumsfeld v. United Tech. Corp.*, 315 F.3d 1361 (Fed. Cir. 2003). The Secretary's share of an indirect cost pool associated with an ISDA contract is generally determined by multiplying the contractor's "indirect cost rate" against the ISDA contract's direct cost base (which is to say the "Secretarial amount" for the contracted hospital or clinic). The Government here does not dispute either the indirect cost rates or the resulting indirect CSC amounts.

taking funds away from direct services, *i.e.*, out of the "Secretarial amount." Annually the Secretary is directed to furnish to Congress a mid-year "accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted." § 450j-1(c)(2). By these means, the ISDA is structured to ensure that contracting tribes are not confronted with the Hobson's choice of either subsidizing the necessary overhead costs of running Federal facilities, or diverting funds the Secretary would have paid for patient care (the "Secretarial amount") to pay for overhead.

In order to end a rampant agency practice of funding agency operations at the expense of fully paying ISDA contracts, Congress also devoted a lengthy section of the Act to cataloguing specific funding prohibitions. Thus, Congress specified that "[t]he amount of funds required by [section 450j-1(a)] . . . shall not be reduced to make funding available for contract monitoring or administration by the Secretary," § 450j-1(b)(1); "shall not be reduced by the Secretary in subsequent years" except for five narrow reasons not directly pertinent here, § 450j-1(b)(2); "shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring," § 450j-1(b)(3); and "shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract," § 450j-1(b)(4). "This section protects contract funding levels provided to tribes, and prevents the diversion of tribal contract funds to pay for costs incurred by the Federal Government." S. Rep. No. 100-274, at 30. These and related provisions were necessary because the IHS and BIA repeatedly prioritized using their lump-sum appropriations to fund their own administration over their statutorily-mandated contract obligations, and failed to include in their internal

budgets sufficient funding to pay those obligations in full. *Id.* 8, 12, 30-32 (discussing agency failures).

Congress further made plain that the ISDA involves the execution of an enforceable "contract . . . between a tribal organization and the appropriate Secretary," § 450b(j), using the term "contract" 426 times to connote a "legally binding instrument" (S. Rep. No. 100-274, at 19), and clarifying beyond peradventure their judicial enforceability both through "mandamus" and through the "money damages" remedy available in the "Contract Disputes Act." § 450m-1(a), (d). As the Senate Committee pointedly noted (S. Rep. No. 100-274, at 37):

> [t]he[se] strong remedies . . . are required because of th[e] agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations.

The ISDA also sets forth a statutory model agreement, codified at § 450*l*(c), which includes the mandatory incorporation into the contract of all provisions of the Act, sec. 1(a)(1); a mandatory rule of construction directing that "[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor," sec. 1(a)(2); an "effective" date "upon the date of the [parties'] approval and execution," sec. 1(b)(2); a funding provision stating that, "[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2) [and] [s]uch amount shall not be less than the applicable amount determined pursuant to section 450j-1(a) of the [ISDA]," sec. 1(b)(4); the incorporation into the contract of an "Annual Funding Agreement" (AFA), sec. 1(f)(2); a pay-

ment provision directing "the Secretary shall make available to the Contractor funds [specified in the AFA] by paying to the Contractor . . . in accordance with such method as may be requested by the Contractor," sec. 1(b)(6)(B)(i); and an exemption from "program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to . . . or otherwise required by law," sec. 1(b)(11).

Finally, and consistent with Congress's retained authority over appropriations, the second sentence of § 450j-1(b) provides: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations . . . ." *See also* § 450*l*(c) (sec. 1(b)(4)). In the second half of that sentence Congress also instructed that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." Congress here recognized that the mandatory payment of CSCs (an item not previously included in the IHS budget) to contracting Tribes would require higher aggregate spending; although this proviso makes clear that the Secretary is not bound to divert funds from other Tribes to pay his mandatory ISDA contract obligations (*i.e.*, he may keep other tribal spending constant), he is fenced in by § 450j-1(b)'s first sentence prohibiting the Secretary from prioritizing expenditures for his Federal functions over his contract obligations.[3]

In sum, Congress "clearly expressed . . . its intent to circumscribe as tightly as possible the discretion of the Secretary." *RNSB*, 87 F.3d at 1344. Indeed, "[p]recisely because the Secretary had consistently failed to behave in a

[3] Capping these reforms, Congress replaced IHS's general regulatory authority with limited rulemaking in specific areas, none of which includes matters pertaining to contract funding (including CSCs), § 450k(a)(1). *See* S. Rep. No. 103-374, at 14 (1994) ("Beyond the areas specified . . . no further delegated authority is conferred").

reasonable manner . . . Congress elected specifically to cabin the Secretary's discretion under the Act." *Id.* at 1345 n.9.

2. The Relevant Appropriations Acts. These cases involve successive one-year contracts, each to be paid from one of four annual IHS Appropriations Acts. *See* Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993); Pub. L. No. 103-332, 108 Stat. 2499, 2527 (1994); Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996); Pub. L. No. 104-208, 110 Stat. 3009, 3009-212 (1996). Each of these Acts specified that "funds made available to tribes . . through contracts . . . authorized by the [ISDA], shall be deemed to be obligated at the time of the . . . contract award," *id.*, which is to say well in advance of most other expenditures. (The subject contracts were executed months in advance of the Appropriations Acts, *infra* 14-16.)

Congress in these four Acts appropriated to IHS ever increasing lump-sum amounts of $1.646 billion, $1.713 billion, $1.748 billion and $1.806 billion, respectively, "to carry out . . . the Indian Self-Determination Act." 107 Stat. at 1408; 108 Stat. at 2527; 110 Stat. at 1321-189; 110 Stat. at 3009-212. Of these respective sums, $1.277 billion, $1.331 billion, $1.366 billion and $1.419 billion were entirely unrestricted by any earmarks (the remainder being set aside for specific purposes).[4]

At the start of each year, these sums included approximately $88.1 million, $53.7 million, $35.8 million and $52.3 million, respectively, in unrestricted increases over the preceding year. As IHS later would report, it ended each year

[4] The amount of the unrestricted appropriation is determined by deducting all funds specifically set aside for designated purposes. For instance, of the total $1,747,842,000 appropriated in FY1996, four earmarks set aside $12,000,000 for catastrophic health needs, $350,564,000 for contract medical care, $11,306,000 for IHS's loan repayment program, and $7,500,000 for the Indian Self-Determination Fund. 110 Stat. 1321-189.

with "actual" "end of year" "unobligated balance[s] available" of $59 million, $55 million, $76 million and $98 million, respectively.[5] The Secretary concedes that during the first three of these four years, at least $1.2 million to $6.8 million in appropriated funds went unspent. *Thompson*, Pet. 33a. Such leftover balances generally remain available for expenditure for five years. 31 U.S.C. 1552(a), 1553(a).

The Appropriations Acts here at issue involve "lump-sum" appropriations. That is, although the relevant committees regularly made non-binding recommendations, Congress in these four Acts never "earmarked" a maximum "not to exceed" amount that IHS could spend for CSCs. In this respect, the IHS portion of each Act differed from the BIA portion of the same Acts, *compare*, *e.g.*, 107 Stat. at 1391 (FY1994), and from the IHS portion of later Acts, *e.g.*, Pub. L. No. 105-83, 111 Stat. 1543, 1583 (FY1998) (1997) (the so-called "cap years").

Congress also recognized the need to accord special flexibility for contractors' "transitional" costs when taking on a new contract (or expanding an existing one) in the course of the year. Thus, each Appropriations Act included a special 'no-year' or "carryover" fund of unlimited duration (*Thompson*, Pet. 25a): "of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts . . . with the [IHS] under the provisions of the [ISDA]." *E.g.*, 110 Stat. at 1321-189 (ISD Fund). This formulation differed from Congress's inclusion of the ISD Fund within an overall "not to

[5] *See* PRESIDENT'S BUDGET FOR FISCAL YEAR 1996 (Feb. 1995), Budget App. 471 (ident. code 24.40); PRESIDENT'S BUDGET FOR FISCAL YEAR 1997 (Jan. 1996), Budget App. 479; PRESIDENT'S BUDGET FOR FISCAL YEAR 1998 (Jan. 1997), Budget App. 500; PRESIDENT'S BUDGET FOR FISCAL YEAR 1999 (Jan. 1998), Budget App. 404.

exceed" CSC earmark in later Appropriations Acts, *e.g.*, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-182 (FY2000) (1999).

3. IHS's Unauthorized And Non-Binding Procedures. As noted *supra* 10 n.3, IHS's improper conduct led Congress in 1994 to withhold from the Secretary any "delegated authority" over CSC issues, including any authority to promulgate regulations on the topic. *RNSB*, 87 F.3d at 1350 (noting "ISDA's absolute ban on the imposition of [nonregulatory requirements] regarding CSCs"); 25 U.S.C. 450k(a)(1) ("the Secretary . . . may not . . . impose any non-regulatory requirement relating to self-determination contracts"); *see also* 25 C.F.R. § 900.5 (unpublished requirements are not binding). Nonetheless, in the 1990s IHS imposed on tribal contractors an unpublished, non-binding internal "policy" on the issue. Indian Self-Determination Memorandum 92-2, superceded by IHS Circular 96-04. JA 6, 20. The policy recognized two categories of tribal contracts: "ongoing" contracts, and "initial (or 'new') and expanded" contracts. "Ongoing" contracts were contracts (or the portions of contracts) that covered the operation of the same IHS facility that a contractor had been operating in one or more previous years. "Initial or expanded" contracts were either new contracts or the portions of existing contracts that were being expanded to add a facility not previously operated under the contracts. JA 8; *Thompson*, Pet. 22a. IHS placed all the initial or expanded contracts on an IHS list, JA 31, with the oldest ones at the top. Having divided contracts this way, IHS then limited CSC payments to each. First–and notwithstanding the utter silence in the Appropriations Acts–IHS annually limited its total CSC payments for "ongoing" contracts to the amount "recommended" for that purpose in committee reports. *Thompson*, Pet. 8, 19a-20a. Second, IHS annually took the no-year ISD Fund for "transitional costs" and used it to pay all CSC's for a few "initial or expanded" contracts at the top of the IHS list. *Id.* 9a n.3; JA 31. Since $7.5 million did not cover all CSCs for all contracts, by this

device IHS paid *no* CSCs ("transitional" or otherwise) for other contracts lower on the list.[6]

4. Facts Pertaining To *Thompson*, No. 03-853 (FY1994-1996). Since the facts relevant to No. 03-853 arose earlier than those relevant to No. 02-1472, we address them first.

IHS owns various hospitals and clinics in northeastern Oklahoma, including the Sallisaw and Stilwell clinics. It also operates various "contract health care" physician referral programs, community health programs, two hospitals and other facilities, all within the Cherokee Nation's 7,000 square mile jurisdictional area. Since at least 1983 the Cherokee Nation has carried out various ISDA contracts (converted in June 1993 to a "Compact") with the United States to operate increasing portions of these facilities on the Government's behalf. *Thompson*, Pet. 7a; *Cherokee*, Pet. 32a.

By FY1994, the Cherokee Nation and the Secretary had expanded the parties' Annual Funding Agreement (AFA) to include the operation of IHS's new Sallisaw and Stilwell Clinics. (Although operation of the new Sallisaw Clinic was first added in the FY1992 AFA, the Clinic was not fully operational until FY1994.) The FY1995 AFA added to the contract scope of work the IHS "Contract Health Care Out-Patient" (CHC-OP) physician referral program. *Thompson*, Pet. 54a-55a, 79a-80a; JA 161-62. (The FY1996 AFA did not expand the contract scope of work.)

Each AFA at issue in No. 03-853 (covering FY1994-1996) was executed and awarded in the month of June preceding the fiscal year period of performance. JA 240, 259, 277. Each AFA was also incorporated into the parties' master Compact

[6] Contrary to each Appropriations Act, IHS also did not limit the ISD Fund to contracts that were new or newly-expanded in the year of payment. No. 03-853, 2 C.A. App. 427 (ISD Queue #99-1). More recently, IHS has abandoned the controversial "Queue" Policy, and now pays the annual ISD Fund only to contracts that in the year of payment are, in fact, "new" or "expanded" that year. *See* IHS Cir. 2001-05, at 10.

executed June 30, 1993. *Thompson*, Pet. 7a. The parties executed these documents under the authority of the Tribal Self-Governance Demonstration Project established under the now repealed Title III of the ISDA, added by Pub. L. No. 100-472, § 209, 102 Stat. 2285, 2296 (1988), as amended, 25 U.S.C. 450f note (1988). Under Title III, annual AFAs had to be finalized and presented to Congress 90 days before they went into effect. *Id.* § 303(a)(9).[7]

The three AFAs and the master contract typically required the Secretary to pay in full all amounts due including CSCs "'[s]ubject only to the appropriation of funds by the Congress of the United States,'" *Thompson*, Pet. 8a. Although the relevant Appropriations Acts each year made available ever-growing, unrestricted multi-billion dollar appropriations "to carry out the [ISDA]" that were never fully spent, *supra* 11-12, every year IHS failed to pay the Cherokee Nation its full CSC requirements. Specifically, IHS failed to pay any of the fixed CSCs associated with operating the Sallisaw, Stilwell and CHC-OP portions of the contracts, and in one year also failed to pay in full the fixed CSCs associated with operating the remainder of that year's contract. *Thompson*, Pet. 79a-80a (computing amounts). The parties stipulated that the Cherokee Nation suffered combined damages under

[7] Self-determination "contracts" are entered into under Title I, §§ 450-450n. Title III incorporated all of Title I's funding and remedial provisions, *see, e.g.*, §§ 303(a)(6), (d), 102 Stat. at 2297-2298. *Thompson*, Pet. 7a ("The [Cherokee] compact . . . incorporated all of the terms of [the] model agreement" which "[t]he ISDA requires . . . every self-determination contract [to] incorporate"); *Cherokee*, Pet. 2a n.1 ("[t]here is no material distinction for purposes of this appeal between an agreement called a 'compact' and an agreement called a 'contract'"). *See also*, 25 U.S.C. 458cc(*l*) (incorporation of Title I provisions into Title III contracts). Since August 2000, "self-governance" agreements are entered into under the authority of Title V, Pub. L. No. 106-260, 114 Stat. 711 (2000), 25 U.S.C. 458aaa *et seq.*

the three contracts of $8.5 million resulting directly from these underpayments. *Id.* 41a.

5. Facts Pertaining To *Cherokee Nation and Shoshone-Paiute Tribes*, No. 02-1472 (FY1996-1997). In FY1997, the Cherokee Nation and the Secretary expanded the parties' AFA to add the "Contract Health Care In-Patient" physician referral program associated with IHS's Hastings Hospital in Tahlequah, Oklahoma. JA 162, 185. In all other respects, including IHS's failure to pay CSCs associated both with this expanded portion of the contract and the Sallisaw, Stilwell and CHS-OP portions of the contract, the facts are materially identical to the facts giving rise to No. 03-853.

With respect to the Shoshone-Paiute Tribes, IHS has long operated the Owyhee Community Hospital on the remote Duck Valley Reservation in northern Nevada, along with a variety of community health programs under tribal contract since the 1980s. *Cherokee*, Pet. 30a. After entering into a Title III Compact in 1994, the parties in June 1995 entered into an expanded AFA for the coming year (FY1996) to include operation of the Owyhee Hospital. *Id.* As with the Cherokee AFA, the Secretary agreed to pay for this expanded undertaking in a single amount at the beginning of the year. *E.g.*, JA 78-9 (requiring "advance lump sum" payment, "unless otherwise provided in [an AFA]" "on or before ten calendar days after the date on which the [OMB] apportions the appropriations for that fiscal year"), 122 (AFA). The AFA required IHS to pay the Tribes $2,035,066 in fixed CSC costs associated with this expanded portion of the contract, *Cherokee*, 8a-9a, 31a-32a. This sum was calculated pursuant to the guidance set forth in ISDM 92-2, to which the parties agreed only "[t]o the extent not inconsistent with [§§ 450j-1(a) & (b)] of the [ISDA]." JA 120 (Sec. 7(b)). IHS never paid this sum. In advance of FY1997, the Tribes contracted to continue the ongoing operation of the Hospital, but once again IHS failed to pay any of the Tribes' CSCs associated with that portion of the contract. Pet. 8a-9a, 31a-32a. As a result, the Tribes were compelled to severely reduce patient care to cover the shortfall, *id.* 9a; JA 60-61, 67, 71.

All the contract documents in both cases specified that payment by the Secretary was subject solely to one condition, namely *Congressional* action in the follow-on Appropriations Acts. Using "virtually identical language" developed by IHS, the compacts specified that the Secretary's payments were "[s]ubject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to [§ 450j-1(b)] of the [ISDA]." JA 78. Echoing this language, the Shoshone AFAs noted that the contract amount was only subject "to adjustment due to *Congressional* action in appropriations Acts or other laws affecting [the] availability of funds to the [IHS]," while also specifying that any subsequent adjustment in funding amount shall be "subject to any rights which the Tribes may have under this Agreement, the Compact, or the law." JA 121-22 (emphasis added). Similarly, the Cherokee AFA made note of possible "unanticipated *Congressional* action" and specified that changes may be proposed "[u]pon enactment of relevant Appropriations Acts," though cautioning that the AFA funding amount "shall not be modified to decrease or delay any funding except pursuant to mutual agreement of the parties." JA 190 (emphasis added). At no time did either Tribe consent to a decrease in CSC funding. In each instance, IHS based its failure to pay on its non-binding CSC allocation policy and alleged appropriation shortfalls.

6. The 1998 Rider "Section 314." As noted, these two breach of contract cases arose in FY1994 through FY1997. In connection with this same period, a similar case was proceeding in Oregon district court, and in December 1997 and February 1998 that court held the Government liable for

failing to pay a tribal contractor full CSCs in FY1996.[8] Also in December 1997, the IBCA issued a similar ruling against the BIA involving its FY1993 lump-sum appropriation.[9] Contemporaneously, in November 1997 IHS widely circulated to tribal contractors a draft document proposing to collect the unspent lump-sum appropriations then still available from the several preceding Appropriations Acts (that is, FY1993 through FY1996), and to pay those funds to contractors who had been shorted in the prior years (as 31 U.S.C. 1552(a) & 1553(a) permit). JA 206. But in October 1998 Congress enacted "Section 314," an FY1999 Appropriations Act rider, which the Secretary has argued retroactively declared that additional IHS appropriations in FY1994 through FY1997 were legally unavailable to pay Tribes their full CSC obligations. *E.g.*, *Cherokee*, Pet. 20a-21a; *Thompson*, Pet. 69a. The rider in part provides:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the [BIA and IHS] by [the FY1994 through FY1998 Appropriations Acts] . . . for [CSCs] associated with

[8] *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1332 (D. Or. 1997) ("*Shoshone I*") ("no statute expressly restrict[ed] the Secretary's ability to shift funds within its general appropriations to pay CSC"), modified, 999 F. Supp. 1395 (1998) ("*Shoshone II*"), on remand, 58 F. Supp. 2d 1191 (1999) ("*Shoshone III*"), rev'd as to "new and expanded" CSCs and § 314, 279 F.3d 660 (9th Cir. 2002) ("*Shoshone IV*").

[9] *In re Alamo Navajo School Bd., Inc. & Miccosukee Corp.*, Nos. 3463-3466 & 3560-3562, 98-2 BCA ¶¶ 29,831 & 29,832, 1997 WL 759441 (IBCA Dec. 4, 1997), *appeal voluntarily dismissed in part sub nom. Babbitt v. Miccosukee Corp.*,185 F.3d 880 (Fed. Cir. 1998) (unpub'd) (involving pre-FY1994 years when the BIA's CSC appropriation was not capped), *rev'd in part*, 217 F.3d 857 (Fed. Cir. 1999) (unpub'd) (involving later years when the BIA CSC appropriation was capped). Congress did not begin capping the availability of the IHS appropriation to pay "ongoing" CSCs until FY1998, *supra* 12.

> self-determination or self-governance contracts . . . are the total amounts available for fiscal years 1994 through 1998 for such purposes . . . .

Pub. L. No. 105-277, § 314, 112 Stat. 2681-288 (1998). Although the history specific to this rider is unilluminating, the accompanying Senate Appropriations Committee report elsewhere noted that "in several cases the Federal courts have held the United States liable for insufficient CSC funding," and on this account requested a General Accounting Office report. S. Rep. No. 105-227, at 52 (1998).

7. Proceedings Below.

a. *Cherokee*, No. 02-1472. After exhausting their remedies under the CDA the Tribes in March 1999 joined together in a breach of contract action against the United States, seeking damages under § 450m-1(a). *Cherokee*, Pet. 35a. On cross-motions for summary judgment, the district court concluded that, notwithstanding silence in the Appropriations Acts, the FY1996 and FY1997 appropriations for ongoing CSCs had been "earmarked in appropriation committee reports," *Cherokee*, Pet. 46a, adding that appropriations were "insufficient" because IHS eventually "spent" its appropriations on other things. *Id.* The district court also ruled that § 314 imposed a retroactive "cap" on the amounts IHS could spend on CSCs associated with the "initial or expanded" portions of the Tribes' contracts. *Id.* 49a.

The Tenth Circuit affirmed, relying on an agency affidavit to conclude that "all of the money appropriated for fiscal years 1996 and 1997 was in fact spent, leaving a zero balance at the end of the year," and further "declar[ing] that 'reprogramming additional funds for [CSCs] would have required IHS to use money otherwise dedicated to other purposes supporting health services delivery to tribes.'" *Id.* 14a-15a. The court further ruled that the Secretary had the discretion to follow committee recommendations in lieu of his contract obligations, *id.* 16a, and that "§ 314 retroactively gave those

committee earmarks binding authority," *id.* 16a n.8. Finally, the court found the ISD Fund language ambiguous, and that Congress in § 314 retroactively removed the ambiguity, *id.* 18a-20a.

b. *Thompson*, No. 03-853. After exhausting its remedies under the CDA (*Thompson*, Pet. 74a), the Cherokee Nation filed a timely appeal with the IBCA. Following the enactment of § 314, IHS moved to dismiss. *Id.* 9a-10a, 52a. The Cherokee Nation then moved for partial summary judgment of liability. *Id.* 52a. In ruling for the Tribe, the IBCA held that the appropriations committee's "nonstatutory instruction[s]" were "legally unenforce[able]" and "non-binding" under standard appropriations law. *Id.* 57a. Relying on "case law that dates back to the post-Civil-War period," the Board held that "when a Government agency has a sufficient unrestricted lump-sum appropriation available to it, it is bound by its contracts to the same extent that a private party would be." *Id.* 66a. The Board also rejected the Secretary's § 314 argument, finding the rider to have "simply prohibit[ed] the future use of unspent appropriated funds for the 5 prior years as a budgetary measure," *id.* 71a, a reference to 31 U.S.C. 1552(a), 1553(a). On reconsideration the IBCA reaffirmed its ruling, concluding that "IHS has provided neither adequate nor convincing proof . . . that any actual reduction of funds for other tribes would be required to fully fund Appellant's CSCs." Pet. 47a.

The Federal Circuit affirmed, grounding its decision on five "fundamental principles of appropriations law, as enunciated by the Supreme Court, by this court, by our predecessor court, and by other circuits," and by "the opinions of the General Accounting Office [GAO] . . . and . . . the opinions of the Comptroller General." *Thompson*, Pet. 12a. Applying these controlling principles, the court ruled that committee recommendations were not binding and that the Secretary therefore lacked discretion under the ISDA's "availability clause" not to pay the contract obligations in

full, even if doing so required reprogramming other funds, *id.* 19a-20a. In addition to elementary government contracting law, the court rested its decision on the ISDA's elimination of Secretarial discretion over contract funding matters. *Id.* 21a. With respect to CSCs due on the "initial or expanded" portions of the contracts, the Circuit noted the Secretary's "conce[ssion]" that the ISD Fund language did not cap such costs, *id.* 23a, adding that the carryover term establishing the Fund is universally understood as an unambiguous "term of art" "indicating that unexpended funds 'shall remain available' for the same purpose during the succeeding fiscal year." *Id.* 25a.

With respect to § 314, the Federal Circuit concluded that "a statute enacted by Congress . . . could not abrogate the contractor's right to payments that were due before the passage of the statute," *id.* 27a, and that "a later statute cannot be read as clarifying the meaning of an earlier statute where the earlier statute is unambiguous." *Id.* 29a.

Finally, the Federal Circuit concluded the Secretary had failed to raise a triable issue that fully paying on the contracts would have compelled reductions in programs serving other tribes, noting that the Secretary "retained" each year between $25.5 million and $36 million as a "residual" amount to administer "inherently federal functions," and also ended each year with between $1.2 million to $6.8 million in unspent funds, *id.* 32a-33a. Finally, the court rejected the Secretary's late suggestion that the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, could somehow bar a CDA damages award paid out of the Judgment Fund, 31 U.S.C. 1304. Pet. 34a-35a.

SUMMARY OF ARGUMENT

I. Resolution of the issues presented in these cases turns on the plain and unambiguous meaning of the ISDA's mandatory contracting terms. Those terms required the Secretary to enter into contracts for the full amount specified

in 25 U.S.C. 450j-1(a), including the Secretarial amount and CSCs. Although the "provision of funds" for the contracts was "subject to the availability of appropriations," under each of the four relevant Appropriations Acts the full amounts necessary to pay these contracts were "obligated" by operation of law on the date of "contract award." Thus, necessary appropriations were "legally available" to pay these contracts.

The "availability of appropriations" clause is a routine term of art in federal appropriations law, directed to the legal existence of an appropriation to pay a given sum under the so-called "purpose-time-amount" test. Under that test, each of the four Appropriations Acts included funds that were "legally available" to pay the full amounts specified in the ISDA contracts. Since each appropriation available to pay these contracts provided an unrestricted lump-sum amount, rather than a capped amount, under the rule of *Ferris v. United States* the contractors' legal rights could not "be affected or impaired by [the appropriation's] maladministration or by its diversion, whether legal or illegal, to other objects." 27 Ct. Cl. 542, 546 (1892); *see also Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 (Ct. Cl. 1980). Application of the *Ferris-Blackhawk* rule to these lump-sum appropriations is confirmed by Congress's decision elsewhere in these same Acts (and later in other Acts) to cap CSC payments, but not to do so in the provisions at issue here. *Russello v. United States*, 464 U.S. 16, 23 (1983). The rule is consistent with Congress's decision in each Act to deem the necessary contract amounts "obligated" as of the date of contract award, and it cannot be defeated by resort to non-binding committee recommendations regarding how the Secretary might spend his appropriation.

The Secretary had no general discretion, whether based on 'committee recommendations' or otherwise, not to reprogram other funds if necessary to meet his contract obligations, both because a contract is a mandatory payment obligation, *Blackhawk*, 622 F.2d at 552, and because the ISDA made that

obligation a statutory mandate. *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

To confer on the Secretary discretion to spend down his appropriation ahead of his ISDA contract obligations would "exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit," *Holloway v. United States*, 526 U.S. 1, 9 (1999), rendering the Act's key funding provisions "a nullity," *Christensen v. Harris County*, 529 U.S. 576, 585 (2000), while disregarding the overarching statutory command that the ISDA and ISDA contracts "be liberally construed for the benefit of the Contractor." 25 U.S.C. 450*l*(c) (sec. 1(a)(2)). More broadly, such a construction of the routine "availability clause" in Government contracts would frustrate the "'[p]unctilious fulfillment of contractual obligations [which] is essential to the maintenance of the credit of public as well as private debtors,'" *Winstar*, 518 U.S. at 885, by making such contracts "an absurdity." *Murray*, 96 U.S. at 445.

The ISD Funds established in each Appropriations Act did not cap CSCs associated with the expanded portions of the Tribes' contracts. First, they do not mention all CSCs, and are limited only to "transitional costs"—one-time "startup costs" specified in § 450j-1(a)(5). Second, the term of art "shall remain available" that defines each Fund is not a cap on current year spending but only a set-aside of funds for potential "carryover" to future years; the Secretary has consistently so conceded throughout the life of these cases.

Given the unambiguous language of the Appropriations Acts and the ISDA within the framework of time-honored principles of federal contracting and appropriations law, § 314 years later did not, and could not, reduce the Secretary's pre-existing obligation for the full amounts necessary to pay these Tribes on contracts long since performed. Section 314's plain meaning indicates Congress intended only to limit the future expenditure of any remaining unobli-

gated balances from the earlier years. The broader interpretation the Secretary advances would violate the rule that "a later Congress cannot control the interpretation of an earlier enacted statute," *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996). More gravely, the Government's construction would amount to an improper congressional repudiation of Government contracts "simply in order to save money," *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986). Worse yet, that construction would render § 314 an unconstitutional attempt to decree "findings and results under old law" for determining the availability of appropriations under the earlier Appropriations Acts (and thus the Government's liability under long-completed contracts), contrary to the rule of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

II. The Secretary's failure to pay also was not excused by the ISDA's "reduction clause." First, the Secretary waived any right to invoke that clause. Second, the Secretary's construction of that clause would again "exclude from the coverage of the statute most of the conduct Congress obviously intended to prohibit," *Holloway*, 526 U.S. at 9, by wiping out the ISDA's express prohibitions in § 450j-1(b) *against* reducing contract amounts to pay for the Secretary's "administration" and other diverse "Federal functions." Third, the Secretary's proof confirmed that ample funds outside those targeted by the reduction clause were available for reprogramming to satisfy the Secretary's legal duty to pay these contract obligations.

ARGUMENT

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "[W]here, as here, the statute's language is plain," "it is also where the inquiry should end, for . . . 'the sole function of the courts is to enforce it according to its terms.'" *United States*

v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989), quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

This case begins and ends with the plain meaning of key, unambiguous terms in the ISDA and the accompanying Appropriations Acts, which are crystalline on several points. The Secretary is required to enter into contracts upon terms that are dictated by law. 25 U.S.C. 450f(a)(1), 450*l*(c). Those terms require the Secretary to "add to the contract the full amount to which the contractor is entitled," including both the Secretarial amount and CSCs. § 450j-1(g). CSCs are amounts a contractor "is entitled to receive;" they are "required to be paid" and "shall [be] ma[d]e available;" they "shall be added" to the Secretarial amount; they "shall consist of" specified items; they "shall include" various amounts; and (together with the Secretarial amount) they "shall not be less than the applicable amount determined under [§ 450j-1(a)]." § 450j-1(a)(2), (3), (5); § 450*l*(c) (sec. 1(b)(4)).

Neither § 450j-1(b)'s "availability" clause (Part I) or "reduction" clause (Part II) which the Secretary relies upon serves to excuse the Secretary's actions here.

I. THE SECRETARY'S FAILURE TO PAY WAS NOT EXCUSED BY THE ISDA'S "AVAILABILITY" CLAUSE.

A. Appropriations Were Available As A Matter Of Law To Pay The Full Amount Of The ISDA Contracts, Including CSCs, In The Relevant Fiscal Years.

Upon enactment, and by the terms of each Appropriations Act, funds to pay each pre-existing contract were "deemed to be obligated at the time of the . . . contract award." *E.g.*, 107 Stat. at 1408. Thus, since the Appropriations Acts contained no earmarking caps on the amounts available to liquidate those obligations, the Secretary's ample appropriations "to carry out the ISDA" were legally available to pay the Cherokee Nation's and Shoshone-Paiute Tribes' contracts.

The ISDA's condition that contract payments are "subject to the availability of appropriations" was satisfied, the necessary funds were "obligated" immediately by operation of law, and the Secretary was duty bound to pay.

1. Section 450j-1(b)'s "availability of appropriations" clause is a well-understood term in appropriations law, and Congress is presumed to know the meaning of such time-honored "'terms of art.'" *INS v. St. Cyr*, 533 U.S. 289, 312 n.35 (2001), quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952); *see also Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, Thomas, JJ. concurring) ("[w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning"); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (Congress presumed "knowledgeable about existing law pertinent to the legislation it enacts").

As the GAO has noted in its oft-cited treatise on appropriations law, *e.g.*, *Lincoln*, 508 U.S. at 192, "availability" simply means whether "a given item is or is not a legal expenditure" in a given year, an inquiry that turns on the familiar "purpose, time, and amount" test. U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW at 4-2 (2d. ed. 1991) ("APPROPRIATIONS LAW").[10] *See also* INSTRUCTIONS ON BUDGET EXECUTION, OMB Circular A-34, sec. 11.5 at 8-10 (2000) (the 'purpose-time-amount' test answers the question: "**How can I tell whether appropriations are legally available?**"), *superceded by* OMB

[10] *See Thompson*, Pet. 12a ("the opinions of the [GAO], as expressed in [APPROPRIATIONS LAW], and . . . of the Comptroller General . . . while not binding, are 'expert opinion[s], which we should prudently consider'"), quoting *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984); *Ass'n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1116 (D.C. Cir. 2001) (same); *Int'l Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.) (noting GAO's "'accumulated experience and expertise' in the field of government appropriations").

Circular A-11, Part 4 (2002). Thus, appropriations are "legally available" for a "legal expenditure" when making the expenditure is (1) for one of the *purposes* for which the appropriations were made; (2) for an obligation arising in the same *time* period covered by the appropriation; and (3) within the *amount* statutorily authorized for the expenditure. *Id.*

Applying this routine principle of appropriations law, it is readily apparent that the "ongoing" CSC contract payments the Secretary failed to make were "legal expenditures," and that the appropriations were "legally available" to make them. This is so because (1) each payment would have "carr[ied] out" the Appropriations Acts' purpose; (2) each payment would have been for an obligation arising in the same year covered by each appropriation; and (3) the payments would not have exceeded the $1.3 to $1.4 billion Congress made available each year "to carry out the ISDA." In short, the condition reflected in the ISDA—"subject to the availability of appropriations"—was satisfied. This conclusion is reinforced, even mandated, by each Act's declaration that the "available" funds for ISDA contracts have been "obligated" as of the date of the contract award, for an "[o]bligation" is a "legally binding agreement . . . that require[s] the Government to make payments," OMB Circular A-11, sec. 20.5(a) (2003), "'a definite commitment which creates a legal liability of the Government for the payment of appropriated funds for goods and services ordered or received.'" APPROPRIATIONS LAW 7-3 (citing Comp. Gen. decisions). The Government's liability for the full contract obligation could not be clearer.

The Secretary does not dispute that making each payment fell within the "purpose" and "time" prongs of the "availability" test. The Secretary does dispute that paying full CSCs to these contractors was within the "amounts" statutorily authorized each year, but that position cannot be reconciled with settled appropriations law.

2. Fundamental to government contracting law is a long-standing distinction between (1) general lump-sum appro-

priations, *see Int'l Union*, 746 F.2d at 861 ("the lump-sum appropriation has a well understood meaning"); and (2) specific appropriations that recite (or 'cap') the amount available for a particular purpose (usually applicable to a single contract). In the case of a lump-sum appropriation, "[a] contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects." *Ferris*, 27 Ct. Cl. at 546. *See also Dougherty v. United States*, 18 Ct. Cl. 496, 503 (1883) ("we have never held that persons contracting with the Government for partial services under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department"); *Blackhawk*, 622 F.2d at 552 (holding the Government liable for failing to make first settlement payment due from a lump-sum appropriation prior to enactment of a restricting amendment). In the lump-sum *Ferris-Blackhawk* situation, an agency's exhaustion of an appropriation without fully paying the contract prevents the agency from spending more, given the proscription of the ADA, 31 U.S.C. 1341(a)(1)(A), but does not bar a recovery of damages. *N.Y. Cent. RR v. United States*, 65 Ct. Cl. 115, 128 (1928); *see also Lee v. United States*, 129 F.3d 1482, 1484 (Fed. Cir. 1997); *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994); APPROPRIATIONS LAW 6-17.

By contrast, where there is a specifically appropriated sum for a given undertaking, a contractor may, in appropriate circumstances, be held to the limits of the capped amount. *Sutton v. United States*, 256 U.S. 575 (1921) (contractor held to notice of $20,000 statutory limit on agency authority to contract with contractor); *Shipman v. United States*, 18 Ct. Cl. 138 (1883) ("where an alleged liability rests wholly upon the authority of an appropriation they must stand and fall together"); *but see New York Airways, Inc. v. United States*,

369 F.2d 743, 748-49 (Ct. Cl. 1966) (government liability may survive a legally insufficient appropriation depending upon the terms of the contract and the authorizing legislation); *Ross Constr. Corp. v. United States*, 392 F.2d 984, 986-87 (Ct. Cl. 1968) (government liable for losses "beyond the control or responsibility of the . . . contractor"). *See* APPROPRIATIONS LAW 6-18 (discussing the *Ferris* and *Sutton* rules).

Here, there was a lump-sum appropriation, unrestricted in amount, that was legally available to IHS to pay ISDA contract obligations. Unlike *Sutton*, there was no statutory earmark limiting the amount available for a contract. *Id.* 6-4 n.1 (defining "earmark[ ]" as "a specific statutory designation"). To be sure, Congress imposed precisely such a statutory "earmark" on *the BIA*'s payment of ongoing CSCs in a *different* portion of the very same Appropriations Acts, using the common term "not to exceed" (*supra* 12), and in the same manner Congress also capped IHS's ongoing CSC payments in *later* years. *Id.* But the decisive point here is that Congress elected *not* to limit IHS's contract payments in fiscal years 1994-1997. Of course, "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello*, 464 U.S. at 23. Congress's deliberate use of the term of art "not to exceed" elsewhere forecloses inferring from utter silence in the IHS portions of these Acts a comparable legal restriction on IHS's payment of CSCs. Indeed, Congress's decision to begin capping IHS's ongoing CSC payments in FY1998 reflected a deliberate change, not some accident of drafting, *see* H.R. Conf. Rep. No. 105-337, at 90 (1997) ("Amendment No. 110 . . . inserts language placing a cap . . . on contract support costs in the [IHS], services account"), and a "cardinal principle of statutory construction" is the "'duty to give effect, if possible, to every clause and word of a statute'" so as not to render any "superfluous," *Duncan v. Walker*, 533

U.S. 167, 174 (2001). *Pierce County v. Guillen*, 537 U.S. 129, 145 (2003) (an amendment must be given "'real and substantial effect'").

In sum, under the *Ferris-Blackhawk* rule, the Government is liable in damages for the unpaid contract amounts, regardless of any subsequent exhaustion, "whether legal or illegal," of the Secretary's appropriations for other purposes. Even putting *Ferris* aside, the Government is still liable because the Appropriations Acts at issue here deemed the contract amounts to be instantly "obligated" back to the date of contract "award," well in advance of any possible future exhaustion of the appropriation for other purposes.[11]

3. The Tenth Circuit in *Cherokee* fundamentally erred in concluding that the Secretary could elevate mere committee recommendations over his contract obligations. *Cherokee*, Pet. 7a-8a. The court's action violated the "fundamental principle of appropriations law . . . that where 'Congress merely appropriates lump-sum amounts . . . indicia in committee reports and other legislative history as to how funds should or are expected to be spent do not establish any legal requirements on' the agency." *Lincoln*, 508 U.S. at 192, quoting *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975); *see also* APPROPRIATIONS LAW 6-159 ("The rule applies equally whether the legislative history is mere acquiescence in the agency's budget request or an affirmative expression of intent.") As Justice Scalia put it in *Int'l Union*, "as far as the courts are concerned" the "focus . . . must be upon the text of the appropriation," not "committee reports and other entrails of legislative history." 746 F.2d at 860-61.

The Tenth Circuit disregarded this cardinal principle in the contract setting, where it has long been settled law that:

> the amounts requested or earmarked for the individual items that comprise the budget estimates presented to the Congress, and on the basis of which a lump-sum appropriation is subsequently enacted, are not binding on the administrative officers unless those items (and their amounts) are carried into the language of the appropriations act itself.

Blackhawk, 622 F.2d at 547 n.6. Contrary to the Tenth Circuit's view, the committees' diverse recommendations did not justify the Secretary's failure to pay.

4. The absence of any statutory earmarks, coupled with the ISDA's mandate to pay and the presence of contract obligations, required the Secretary to "reprogram" how he originally planned to spend his appropriation if his original budget was insufficient to meet those obligations (something he certainly was authorized to do, *see Thompson*, Pet. 15a-16a, discussing reprogramming procedures and citing *Lincoln*, *LTV* and *Blackhawk*). The Tenth Circuit's view that the Secretary's reprogramming authority in these circumstances was discretionary was wrong, for "an agency is *required* to reprogram if doing so is necessary to meet debts or obligations." *Id.* 16a, citing APPROPRIATIONS LAW 2-26 ("In some situations, the agency's discretion [to reprogram]

---

[11] Putting the *Ferris-Blackhawk* rule aside, the ISDA is arguably an independent source of a *minimum* earmark for the full contract amounts out of the agency's general lump-sum appropriation. This argument rests on Congress's direction in the ISDA that the amount of each contract "*shall not be less than* the applicable amount determined pursuant to [§ 450j-1(a)]." § 450*l*(c) (sec. 1(b)(4)) (emphasis added). The Comptroller General has held that measures in *authorizing* statutes requiring an agency to pay a stated amount establish binding "earmarks" that control the agency's spending absent an overriding provision in an appropriations act. APPROPRIATIONS LAW 2-42 - 43 ("when an authorization establishes a minimum earmark ('not less than,' 'shall be available only'), and the related appropriation is a lump-sum appropriation . . . the agency must observe the earmark . . . even though following the earmark will drastically reduce the amount of funds available for non-earmarked programs funded under the same appropriation"), citing *In re Hon. Brown*, 64 Comp. Gen. 388 (1985); *In re Hon. Oxley*, B-131935, 1986 WL 63785 (Comp. Gen. Mar. 17, 1986). This rule reflects the application of the more general rule that, wherever possible, appropriations acts must be read consistent with the applicable authorizing acts.

may rise to the level of a duty."). In that event, the Secretary simply has no discretion to disregard his "debts or obligations," and may *not* simply choose to adopt a committee's "recommendations." Thus, when given a lump-sum appropriation that is legally available to pay an obligation, "[a]dministrative barriers [regarding internal agency budgets] of the sort which the Government's argument raises are purely of an in-house accounting nature and, as such are irrelevant to any determination respecting the availability of appropriated funds." *Blackhawk*, 622 F.2d at 552 n.9. Since here "there was no statutory restriction on the reprogramming authority . . . the agency was obligated to make the payments and was liable for breach of contract when it declined to do so." *Thompson*, Pet. 16a.

The *Cherokee* court found spending discretion in *Lincoln*. But *Lincoln* warned that "an agency is not free simply to disregard statutory responsibilities," like those reflected in the ISDA. 508 U.S. at 193. If the ISDA is anything–particularly given § 450j-1(b)'s unique limiting provisions–it is the epitome of a statute that has "circumscribe[d] as tightly as possible the discretion of the Secretary" to manipulate a lump-sum appropriation in a way that would shortchange tribal contractors. *RNSB*, 87 F.3d at 1344.

B. The Tenth Circuit's Reformulation Of The "Availability" Clause Is Neither Plausible Nor Consistent With *Winstar*, *Lynch* And *Murray*.

1. Only by ignoring ordinary principles of appropriations law could the Tenth Circuit conclude that the Secretary retained some measure of "discretion" regarding how much of the appropriation would be made available to pay these pre-existing contract obligations. *Cherokee*, Pet. 16a. The argument it accepted boils down to this: "availability" means whatever the agency chooses not to spend eventually on something else. (Indeed, the Secretary's evidence below was directed at just that.) This formulation fails for two reasons.

First (and as just noted), "it is well recognized that if the Secretary has the authority to reprogram and there are funds available in a lump-sum appropriation, there are 'available funds.'" *Thompson*, Pet. 20a. Even the very committees that made the "recommendations" the Secretary now invokes fully understood this rule: "Without a ceiling on contract support the Bureau [of Indian Affairs] could be required to reprogram from other tribal programs in the Operation of Indian Programs to fund 100 percent of tribal contract support costs." H.R. Rep. No. 105-609, at 57 (1998); *see also* S. Rep. No. 100-274, at 42 (Congressional Budget Office letter noting the 1988 ISDA Amendments could require agencies to pay CSC first). That is exactly what *Blackhawk* holds.

Second, making an exception from ordinary contract and appropriations law here to give the Secretary "discretion" *not* to reprogram "would be directly contrary to the purpose of the 1988 Amendments," *Thompson*, Pet. 21a. The whole point of those Amendments was to "le[ave] the Secretary with as little discretion as feasible in the allocation of [CSCs]," *RNSB*, 87 F.3d at 1344, precisely because of a long history of "systematic[ ]" agency violations of contract rights "particularly in the area of funding indirect [contract support] costs." S. Rep. No. 100-274, at 37. With no discretion even in the contract terms, § 450*l*(c), and express prohibitions on contract funding reductions, § 450j-1(b), it is not credible that in the routine "availability" clause Congress actually intended *sub silentio* to vest in the Secretary the very "discretion" to reduce contract amounts that established law denies all other agencies when dealing with government contractors. Such a formulation improperly "exclude[s] from the coverage of the statute most of the conduct Congress obviously intended to prohibit," *Holloway*, 526 U.S. at 9, rendering the Act's key funding provisions "a nullity." *Christensen*, 529 U.S. at 585; *see also Train v. City of New York*, 420 U.S. 35, 45-46 (1975) ("We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the

seemingly limitless power to withhold funds from allotment and obligation"). This Court should reject such a warped construction of this remedial legislation, all the more so given the Act's mandatory rule that the ISDA and every contract entered into thereunder "shall be liberally construed for the benefit of the Contractor." § 450*l*(c) (sec. 1(a)(2)); *see also* Title III § 303(e); 25 C.F.R. § 900.3(a)(5) (same).

2. The ISDA's "availability" clause is a common feature in the landscape of government contract law. *E.g.*, *Cherokee*, Pet. 78a-87a (listing statutes). If, as the Tenth Circuit has held, a government agency, armed with such a clause and an unrestricted lump-sum appropriation, can simply decide for itself when it has legally available appropriations to pay a contract obligation, the whole concept of a government contract has been eviscerated. Such a sweeping rule is flatly "at odds with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies," *Winstar*, 518 U.S. at 883. Borrowing from *Winstar*, "[i]njecting the opportunity for . . . litigation [over agency spending decisions] into every common contract action would . . . produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be 'of the essence of sovereignty' itself." *Id.* at 884 (citation omitted). Permitting government agencies to avoid paying their just contract debts simply by choosing to spend their monies elsewhere and then claiming poverty, frustrates the "'[p]unctilious fulfillment of contractual obligations [which] is essential to the maintenance of the credit of public as well as private debtors.'" *Id.* at 885, quoting *Lynch*, 292 U.S. at 580 (1934).

The integrity of the Government's contracting process will not long endure a rule which says that each time a contractor signs a contract stating his payments are "subject to the availability of appropriations" it will not be enough that Congress appropriates monies the agency can lawfully pay to liquidate the obligation. Such a proposition defies the whole

concept of a contract, for "'[a] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.'" *Winstar*, 518 U.S. at 913 (Breyer, J. concurring), quoting *Murray*, 96 U.S. at 445. It is the quintessential "illusory promise," *id.* at 921 (Scalia, Kennedy & Thomas, JJ. concurring).

C. The ISD Funds In The Four Appropriations Acts Did Not Cap The Availability Of Appropriations To Pay CSCs For The Expanded Portions Of The Tribes' Contracts.

1. The foregoing discussion concerning the availability of appropriations to pay ongoing contract obligations applies equally to CSCs associated with the "initial or expanded" portions of the Tribes' contracts, the only new issue being the meaning of the appropriations language creating the ISD Fund: "of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts . . . with the [IHS] under the provisions of the [ISDA]." To begin, the quoted provision cannot cap all "contract support costs" because it refers only to the limited subcategory of "transitional costs," a phrase whose meaning refers to "startup costs . . . incurred on a one-time basis," 25 U.S.C. 450j-1(a)(5). So, if this is a cap on anything, it is only a cap on transitional costs (a minor component of the instant claims).

But it is no cap at all. Here again, a proper understanding of the quoted provision is found in time-honored appropriations law that Congress is presumed to know: the operative term creating the ISD Fund–"of the funds provided, $7,500,000 *shall remain available until expended*"–establishes a no-year, carryover account that speaks strictly to the *time* during which the designated sum may be spent, but does not limit the *amount* that may be spent for that purpose in the current appropriation year. *In re Forest Service*, B-231711, 1989 WL 240615 (Comp. Gen. Mar. 28, 1989) (phrase "shall

remain available"-"does not represent a line-item limitation or a cap on the amount of money available for obligation" in the current year, and is not a "maximum or minimum"); APPROPRIATIONS LAW 6-8 ("remain available" is "[e]armarking language . . . used to vary the period of availability for obligation"). *See also Mass. Dep't of Educ. v. United States Dep't of Educ.*, 837 F.2d 536, 538-39 (1st Cir. 1988); *Wilson v. Watt*, 703 F.2d 395, 400 (9th Cir. 1983); *Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 589 n.12 (D.C. Cir. 1977); *In re Hon. Cochran*, B-271607 at *1 (Comp. Gen. June 3, 1996) (all holding clause creates a carryover appropriation). As the *Thompson* court noted, "[i]n the present case, there is no indication that the 'shall remain available' language constituted anything other than a typical 'carryover' provision. It certainly did not constitute a statutory cap excusing the Secretary from fulfilling his obligations under the availability clause of section 450j-1(b)." *Thompson*, Pet. 25a-26a. Even the Secretary's internal CSC circular acknowledged that funds for initial and expanded CSCs could be "made available by appropriation *or reprogramming*," another recognition inconsistent with the notion that the ISD Fund language constituted a cap on CSCs. JA 31 (subpar. (ii)).

2. Congress's use of standard terms of art in appropriations law—"shall remain available," "not to exceed," or "up to"—conveys distinctly different and well-accepted understandings. *Id.* 12a (collecting authorities). *See also St. Cyr*, *Buckhannon*, and *Goodyear*, *supra* 26. Each Appropriations Act at issue here is no different; these distinct uses of special terms of art reflect Congress's retained authority to make final decisions concerning appropriations and should not be ignored.

Not until the FY1998 Appropriations Act did Congress choose to limit any of IHS's CSC payments (*supra* 12), and not until FY2000 did Congress go further and limit current-year payments for "initial and expanded" contracts. *Id.* The

absence of such limiting language in the four Acts at issue here is, again, conclusive. Borrowing from *Russello*, 464 U.S. at 23, the Tenth Circuit should have "refrain[ed] from concluding here that the differing language [across all these Acts] . . . has the same meaning in each."

3. The Tenth Circuit ignored the unambiguous dominant phrase "shall *remain* available" in favor of the subordinate phrase "shall *be* available" to create an ambiguity. This error ripped the subsidiary phrase from its moorings, for in context the words "shall be available" are plainly defining the permitted *uses* of the Fund over the stated period of time, not the *amount* of monies being placed into it. In other words, the Appropriations Acts do not say '$7.5 million shall be available for transitional costs,' but rather that $7.5 million shall remain available indefinitely in an ISD Fund, and *that Fund* shall be available to pay transitional costs. Indeed, throughout the life of these cases the Secretary has unambiguously "conceded" that the ISD Fund language did *not* cap the availability of the overall appropriation to pay such costs. He has noted that "'[u]nlike the [BIA], [IHS's] annual appropriation acts [for the ISD Fund] did not place such a cap,'" adding that "'[i]n order to be a statutory "cap," the language would have to read that "not to exceed" $7.5 million was available for new [CSCs], rather than that $7.5 million "shall remain available."'" *Thompson*, Pet. 23a (quoting Secretary's brief). That is a reasonably succinct summary of the law on this point.

D. Section 314 Did Not, And Could Not, Retroactively Alter The "Availability Of Appropriations" Years Earlier To Pay The Tribes' Contract Obligations.

Years after these two Tribes' contracts were fully performed, Congress in § 314 of the FY1999 Appropriations Act declared in pertinent part that "[n]otwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the . . . [IHS] by [the FY1994 through

FY1998 Appropriations Acts] . . . for contract support costs . . . *are* the total amounts available for fiscal years 1994 through 1998 for such purposes." (Emphasis added.)

The precise meaning of this rider seems clear enough. It speaks in the present tense to amounts that "*are* . . . available" for CSCs from the earlier years. *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"). In combination with the "notwithstanding" clause (presumably intended to override some inconsistent "provision of law"), the rider should be read to say that during the fiscal year the agency is being denied the authority otherwise available under 31 U.S.C. 1552(a), 1553(a), to obligate leftover portions of the earlier lump-sum appropriations for CSC purposes. *Supra* 12. Indeed, such a reading squares with the agency's aborted plan to use its leftover funds precisely this way, *id.* 16, and its temporary effect is confirmed by the measure's annual reenactment, *e.g.*, 113 Stat. at 1501A-192, § 313 (FY2000). The Federal Circuit, the IBCA twice, and the Oregon district court (*Shoshone III*), have all read § 314 this way.

But according to the Secretary, § 314 means something far more momentous: that Congress in 1998, "notwithstanding" the unrestricted language of the earlier Acts, purported to *rewrite* them by adding in capping language where none previously had existed. The plain language of the rider does not compel that reading, and the rider's legislative history does not support it either. Under the Secretary's reading, the rider automatically defeats any contract damage claims pending at the time, so that those cases would be over. And yet, when the committee that wrote the rider addressed CSC issues elsewhere in its report, it discussed the pending cases as if they were continuing. Instead of mentioning § 314, it directed the GAO to prepare a report exploring the background and potential impact of the then-pending litigation. *See* S. Rep. No. 105-227, at 51-52. This is a

meaningless exercise if the Committee believed it was putting an end to that very litigation.

Faced with the clarity of the earlier lump-sum appropriations, the Federal Circuit correctly followed this Court's instruction that "the views of subsequent Congresses cannot override the unmistakable intent of the enacting one." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). *See also Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283-84 (11th Cir. 1999); *Beverly Cmty. Hosp. Ass'n v. Belshe*, 132 F.3d 1259, 1266 (9th Cir. 1997). That should be the end of the matter.

The Tenth Circuit sidestepped the issue by concluding that § 314 merely *clarified* retroactively the earlier Appropriations Acts, presumably a reference to *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969), and its progeny. But "the view of a later Congress cannot control the interpretation of an earlier enacted statute," *O'Gilvie*, 519 U.S. at 90, and these unambiguous lump-sum appropriations were hardly in need of clarification. After all, one can clarify an earlier law, but "WHITE cannot retrospectively be made to assert BLACK." *United States v. Montgomery County*, 761 F.2d 998, 1003 (4th Cir. 1985). *Red Lion* and its progeny should be confined to situations involving genuine clarifications. *E.g.*, *Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887, 890 (1st Cir. 1992); *NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1500-01 (5th Cir. 1990); *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984); *Brown v. Marquette Sav. & Loan Ass'n*, 686 F.2d 608, 615 (7th Cir. 1982). *See also Piamba*, 177 F.3d at 1283-84 (focusing on "whether a conflict or ambiguity existed" and "a declaration by the enacting body that its intent is to clarify the prior enactment"); *Beverly*, 132 F.3d at 1265-66 (subsequent statute entitled "Clarification" enacted after a "split of authority"). With no ambiguity present here when § 314 was enacted, that rider cannot alter the clear meaning of the earlier Acts. *See also Paramount Health Sys., Inc. v. Wright*, 138 F.3d 706, 710 (7th Cir. 1998) (criticizing

notion that "a disappointed litigant in a statutory case in a federal district court could scurry to Congress while the case was on appeal and request a 'clarifying' amendment that would reverse the interpretation . . . given to the statute, even if that meaning was crystal clear").

The deeper problems with the Secretary's formulation are twofold: The first arises from the fact the availability of appropriations for these contracts was established at the time of the respective Appropriations Acts; since appropriations were legally available under those Acts, the Tribes had a contractual right to payment of CSCs at that time. Congress cannot then go back and legislatively undo the Government's liability, for while the Government retains "sovereign power" to enact "public and general" legislation that *incidentally* affects those with whom it contracts, "[t]his Court has previously rejected the argument that Congress has 'the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money.'" *Winstar*, 518 U.S. at 917-18 (Breyer, J. concurring), *quoting Bowen*, 477 U.S. at 55, and citing *Perry v. United States*, 294 U.S. 330, 350-51 (1935), and *Lynch*, 292 U.S. at 576-77. *See also United States v. Larionoff*, 431 U.S. 864, 879-880 (1977) (providing same protection for statutorily created vested rights). Where, as here, there is a particular "concern with governmental self-interest . . . 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate.'" *Winstar*, 518 U.S. at 897 n.41. *See also id.* at 898 ("The greater the Government's self-interest . . . the more suspect becomes the claim" of sovereign authority to act).

The second, and graver, problem with the Secretary's formulation is that interpreting § 314 to govern past obligations of lapsed appropriations raises serious constitutional questions under *Klein*, *supra*, and "every reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). In *Klein*, this Court declared a statute unconstitutional in part because it sought to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." 80 U.S. at 146-47. Since the *Klein* prohibition "does not take hold when Congress 'amends applicable law,'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995), quoting *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992), the key distinction for separation of powers purposes is that Congress may "compel[] changes in law, [but] not findings or results under old law." *Robertson*, 503 U.S. at 438. *See also Miller v. French*, 530 U.S. 327, 348-49 (2000). Here, it is clear that § 314 does not "amend" or "compel changes" in any statute with current effect. There is nothing to amend: the statutory appropriations for fiscal years 1994-1997 are completed acts, not statutes with current application subject to congressional revision. The Government's construction of § 314 as intended to declare a binding rule for determining the availability of appropriations under prior-year Appropriations Acts (and thus the Government's liability under those Acts) would render this statute an unconstitutional attempt to decree "findings and results under old law" in then pending breach-of-contract cases (such as the *Thompson* and *Shoshone-Bannock* cases).

The difficulty of construing § 314 in a manner that unlawfully cuts off contract rights contrary to *Winstar*, or in a manner that unconstitutionally declares a rule of decision contrary to *Klein*, confirms the wisdom of avoiding such issues. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (wherever possible, Court construes statutes to avoid "rais[ing] serious constitutional problems"). Here that course is easy to follow because Congress spoke with "unmistakable intent" in providing unrestricted lump-sum appropriations, which is what the Federal Circuit correctly held.

II. THE SECRETARY'S FAILURE TO PAY WAS NOT EXCUSED BY THE ISDA'S "REDUCTION" CLAUSE.

With the Secretary's failure to pay indefensible under either the ISDA's availability clause or § 314, the Secretary years after the fact asserted that paying anything more to these contractors–even one penny more–would have forced the Secretary to reduce ongoing programs serving other tribes, something he argues he had a right not to do given the ISDA's "reduction clause." The Secretary thus asks the Court to accept that the "reduction clause" authorized him to place off limits precisely the same amount that his erroneous interpretation of appropriations law placed off limits. That theory is too cute by half and the Federal Circuit correctly rejected it.

1. The Secretary's reduction clause argument is nothing but an attempted *post hoc* re-justification for what actually happened. As the Secretary's own affiants unambiguously declared, no consideration was ever given to paying *anything* more in CSCs through reprogramming actions. Rather, payments were limited because of the Secretary's incorrect application of appropriations law: As IHS saw it, each year "*Congress appropriated [a stated sum] for contract support costs*" and each year "the appropriation for [CSCs] has been distributed, and *no [CSC] funds remain* for that fiscal year." JA 286-87 (¶¶3-8) (emphasis added). *See also* JA 288 (¶2) ("the amount of funds Congress appropriated for CSC . . . was limited"); JA 296 (¶¶4, 5) (explaining CSC is a "budget subactivit[y]" and "Congress *earmarked* the funds for each subactivity"); JA 302 (¶24) (repeating "total" amounts "Congress earmarked . . . in its . . . committee reports"). With this erroneous understanding (*supra* Part I), IHS applied lockstep its "CSC policy outlined in IHS Circulars 92-02 and 96-04" and underpaid the contracts. *Thompson*, No. 03-853, 2 C.A. App. at 464-65 (Demaray Aff. ¶22).

The reduction clause afforded the Secretary the chance to assess his reprogramming alternatives before signing these contracts and to compare his mandatory obligations under the ISDA with his overall budget, including funds budgeted for ongoing "programs . . . serving [other] tribe[s]." If he could reprogram without "reduc[ing]" such funds (for instance, by reprogramming funds from his "Federal functions"), then no "reduction clause" issue would arise and he was required to reprogram accordingly. If full payment could *not* be made without reducing funds budgeted for ongoing programs serving other tribes, he would have the choice whether to reduce them anyway. But at the relevant time the Secretary never made such an assessment, and he cannot do so now. Having waived his threshold opportunity prior to award to show that "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under [§ 450j-1(a)]," 25 U.S.C. 450f(a)(2)(D), nothing thereafter could alter the Secretary's duty to pay the full § 450j-1(a) amount (*i.e.*, the Secretarial amount and the associated fixed CSC costs). *See St. Regis Mohawk Tribe*, DAB No. A-02-12, 2002 WL 125183 (DHHS Jan. 17, 2002) (illustrating unsuccessful § 450f(b) appeal from a timely decision declining to award a contract at a stated sum, based upon the reduction clause).

2. Apart from waiver, the issue here presented involves the proper interpretation of the reduction clause: "[n]otwithstanding any other provision of the [Act], . . . the Secretary is not required to reduce programs . . . serving a tribe to make funds available to another tribe . . . under this [Act]." The Secretary advanced the circular proposition that if IHS's overall mission is Indian health, then every agency activity served some tribe; and if IHS eventually spent its entire appropriation, perforce no spending change could have been made to pay more CSCs without reducing an activity serving some other tribe. The Federal Circuit correctly rejected such

a self-defeating construction of the Act that would render the contracts illusory.

Congress no doubt understood IHS's overall mission, yet in drafting the reduction clause it chose not to permit the Secretary to refuse to pay in order to preserve all his budgeted activities. Instead, it focused only on protecting funds for specific "programs . . . serving a tribe," while in the immediately preceding sentence broadly *prohibiting* any reductions in the contract "amount" to pay for the Secretary's "administration" and "Federal functions." The point was to "prevent[ ] the diversion of tribal contract funds to pay for costs incurred by the Federal government." S. Rep. No. 100-274, at 30.[12] Thus, while the Secretary may or may not choose to reprogram funds for programs serving another tribe, subsections (b)(1), (3) & (4) absolutely prohibit him from awarding a reduced contract amount to preserve or enhance his own bureaucracy. It matters not that these functions include "inherent federal functions" (such as conducting hearings) or other federal functions (like "contract monitoring").[13]

---

[12] Section 450j-1(b)'s targeting of "Federal functions" reaches considerably more than "inherent federal functions," including "contract monitoring," computer acquisitions, and "technical assistance." Moreover, the standard OMB formulation for "inherent federal functions," *e.g.*, OMB Policy Letter No. 92-1, 57 Fed. Reg. 45096, 45100-102 (Sept. 30, 1992), does not apply under the ISDA. H.R. Rep. No. 106-477, at 18 (1999) (discussing Op. of the Sol., Dep't of the Interior (May 17, 1996)). *See also United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) (discussing delegation doctrine). Even if it did, these "Federal functions" and "administration" are not matters "so intimately related to the public interest as to mandate performance by Government employees."

[13] The dichotomy drawn in § 450j-1(b) was not lost on the appropriators either, who time and again urged the Secretary to *reduce* his own administration so that additional resources would be available to meet the Secretary's obligations to contracting tribes. *See, e.g.*, H.R. Conf. Rep. No. 103-740, at 51 (1994) (demanding IHS reorganize and consolidate "to free up funding for additional self-governance compacts in [FY1995] and beyond"); S. Rep. No. 103-294, at 110 (1994) (demanding IHS restructure

The Secretary's construction of the reduction clause puts so much weight on the "notwithstanding" language in that clause that it "would exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit," *Holloway*, 526 U.S. at 9, exempting from any reduction funds budgeted for the very "Federal functions" that Congress wanted to curtail. It would make § 450j-1(b) "destroy itself." *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 228 (1998). Viewed correctly, however, a "notwithstanding" provision trumps only those measures which *must* be trumped else the section be "rendered meaningless," *Shomberg v. United States*, 348 U.S. 540, 545 (1955), reflecting only the "drafter's intention [to] . . . override *conflicting* provisions of any other section," *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (emphasis added). In contrast, to now re-read the ISDA as actually *protecting* the Secretary's bureaucracy would make the entire statutory scheme but "an exercise in futility," *Pierce*, 537 U.S. at 145.

The Federal Circuit's interpretation of the reduction clause gives it appropriate meaning. The Secretary *may*, but need not, reprogram funding for programs serving other tribes to pay an ISDA contractor, but he *must* reprogram other agency funding to pay such contracts (or else, answer in damages). That interpretation reconciles easily with the body of subsection (b), which speaks not to the treatment of funding for other tribal programs but to the subordination of funding for the Secretary's own "administration" and "Federal functions." In accord with the ISDA's special rule of statutory construction, that interpretation is also the one that "benefit[s] . . . the Contractor to transfer the funding . . . from the Federal Government to the Contractor," § 450*l*(c) (sec. 1(a)(2)).

"if additional resources are to be made available to address other priority needs, such as self-governance compacts"); H.R. Rep. No. 103-158, at 100 (1993) (demanding IHS make "reductions . . . across all IHS administrative activities that are not related directly to the provision of health services").

3. The reasonableness of the Federal Circuit's reading of the reduction clause is confirmed by one representative example, "contract monitoring." Twice the ISDA states plainly that the contract amount shall not be reduced to pay for the Secretary's "contract monitoring" activities, §§ 450j-1(b)(1), (3), and just as plainly calls these functions a subset of "Federal functions" (*id.*). "Contract monitoring" is an agency undertaking and certainly not a "program[] . . . serving a tribe" under the reduction clause. It is equally certain the Senate Committee understood that the result of including "contract monitoring" in § 450j-1(b)(1) & (3) would be less funding for that function, for that was the *raison d'etre* of the provision: to undo the explosion in a new "contract monitoring bureaucracy" that had "impose[d] additional reporting requirements on tribal contractors . . . thereby making the contracting process much more burdensome and time-consuming." S. Rep. No. 100-274, at 7. The Committee made plain its "expect[ation] that the federal contract monitoring bureaucracy . . . will be greatly reduced over the next three years." *Id.* at 19.

The Federal Circuit's reading of § 450j-1(b) is eminently sensible given the abuses Congress sought to correct. The Secretary failed to prioritize the payment of these contracts at the expense of funding his diverse "Federal functions" and "administration;" to report annually to Congress on any anticipated mid-year funding "deficiencies," § 450j-1(c)(2); to seek sufficient appropriations; or to seek supplemental appropriations.[14] Such Secretarial misconduct may have led to budgetary constraints, but such consequences still do not excuse a breach of contract. *See United States v. Locke*, 471 U.S. 84, 95 (1985) ("[n]or is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words

[14] *See S.A. Healy Co. v. United States*, 576 F.2d 299, 305 (Ct. Cl. 1978) (holding Government liable in damages for breaching its duty to seek sufficient appropriations to cover the contracts it had signed).

whenever a court believes those words lead to a harsh result"). "Achieving a better policy outcome—if what petitioner urges is that–is a task for Congress, not the courts." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000).

4. The Secretary could never make the showing required under the reduction clause. As an exception to the ISDA's extensive contract payment mandates, the Secretary had the burden to justify any failure to pay under that clause,[15] a heavy burden given that the inability to pay even one penny more without reducing some program serving another tribe is "an element essential to [the Secretary's] case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Mere "conclusory allegations" on the point will not do. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

In *Cherokee*, that burden was made more difficult by the Secretary's summary judgment motion. In that setting, the Secretary could prevail only if, after drawing all reasonable inferences in favor of the Tribal contractors, the available evidence established beyond a doubt that the Secretary had no other funds that might have been reprogrammed. The Secretary never carried that burden. To the contrary, the

[15] *Javierre v. Central Altagracia Inc.*, 217 U.S. 502, 507 (1910) (burden on those "seeking to escape from the contract made by them on the ground of a condition subsequent, embodied in a proviso"); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) ("the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits"); *Mass. Bay Transp. Auth. v. United States*, 254 F.3d 1367, 1373 (Fed. Cir. 2001) (party asserting impossibility has burden to prove it explored and exhausted alternatives); *New Valley Corp. v. United States*, 119 F.3d 1576, 1584 (Fed. Cir. 1997) ("exculpatory provision . . . must [be] construe[d] . . . narrowly and strictly"); 25 U.S.C. 450f(e)(1) ("With respect to any hearing or appeal conducted pursuant to [§ 450f(b)(3)] or any civil action conducted pursuant to [§ 450m-1(a)], the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal").

implausibility of the Secretary's contention should have compelled entry of summary judgment for the Tribes, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), as it did in *Thompson*.

Beyond commonsense, the record proof defeats the Secretary's contention that everything else the agency did during these years was for an ongoing "program[] . . . serving a tribe." For the only two years for which the Secretary offered any detailed proof, JA 213 (*Cherokee*) (FY1996 and FY1997); JA 295 (*Thompson*) (FY1996), IHS expenditures on "Federal functions" included (1) all manner of activities the Secretary took off the top for his theoretical "residual," including so-called "inherently federal functions," and (2) other Federal functions (like contract monitoring) which § 450j-1(b) expressly prohibits preferring over the contracts. With respect to just the former category, on appeal in *Thompson* "[t]he Secretary admit[ed] that he retained . . . $25,522,460 in 1994, $29,613,574 in 1995, and $35,989,621 in 1996," *Thompson*, Pet. 32a, and the Federal Circuit correctly reasoned that this was one ready source from which "the Secretary was obligated to reprogram," *id.* 33a. With respect to both categories of expenditures, they may include as much as over $400 million in IHS Headquarters funds allocated for, *inter alia*, "inherently federal functions"; "Self-Governance [contract] negotiation[s]" (including "Planning, Negotiation, & Travel"); "Headquarters administrative support functions"; and "research" and "evaluation" projects, and at the Area Office level (but not the local service units) $47.7 million on "Direct Operations." JA 215-18, 426, 435 (*Cherokee*); 298, 302, 460, 478, 488 (*Thompson*).

Beyond these amounts, the Secretary could have also considered reprogramming the annual lump-sum appropriation *increases* he received before allocating those sums to increase his funding for ongoing "programs . . . serving a tribe." And, the Secretary could have used his "'unobligated balances,'" at the least "'ranging between $1.2 and $6.8

million,'" *Thompson*, Pet. 33a, sums which were sufficient to warrant IHS proposing to sweep up these balances precisely to pay the CSC costs the Secretary had until then failed to pay. *Supra* 18. Plainly "[t]hese leftover and unexpended appropriations were also available to the Secretary to meet his contractual obligations and did not constitute funding for programs serving other tribes," *Thompson*, Pet. 33a (not to mention the much larger unobligated balances annually reported to Congress, *supra* 11-12).[16]

---

[16] Notwithstanding the Secretary's complaint, *Thompson*, Pet. 28, the Federal Circuit committed no reversible error in quoting certain unrequested information the Secretary volunteered in his own supplemental briefs. At argument government counsel asserted that the agency's entire appropriation had been earmarked or obligated to contracts, and the Court directed the parties to brief that issue. JA 356. The Cherokee did so, relying exclusively on the record, relevant Appropriations Acts, and judicially noticeable public records (*see* F.R.E. 201(d), (f)) to show that the bulk of each year's appropriation was not so earmarked or obligated. The Secretary filed non-responsive briefs which, along the way, informed the court of the amounts quoted here in text. JA 363. Having volunteered the undisputed information in the first place, while never timely objecting to the appellate court's inquiry, the Secretary cannot now be heard to complain that the court read what he wrote. *Ohler v. United States*, 529 U.S. 753, 755 (2000) ("a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted"); *McGillin v. Bennett*, 132 U.S. 445, 453 (1889) (same). And, since the Secretary does not dispute the accuracy of the cited facts, nothing would be gained by ignoring them in favor of a remand whose purpose would be to determine them all over again. Besides, any error was harmless. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54 (1984). The Board record already reported $1.4 million in unexpended funds for FY1996, JA 302, judicially noticeable records indicated much larger unobligated balances (*Thompson*, Pet. 33a n.19), and the Board record established that agency funds had been set aside for "inherently federal functions," JA 299. Since the Secretary failed to carry his burden to prove his reduction clause defense for FY1996, and declined to submit *any* comparable data for FY1994 or FY1995, the record proof that did exist was independently sufficient to support the Federal Circuit's rejection of the defense. *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924).

Even the Secretary's own Departmental Appeals Board has rejected IHS's vague and conclusory incantations of the reduction clause:

> IHS'[s] contention that granting the relief requested would somehow injure other tribes appears to be an argument made without any basis. Compliance with an express and unambiguous statutory mandate takes precedence over what is at best a speculative showing of possible harm to unnamed tribes. There is undisputed evidence in the record that IHS has the ability to control and reprogram its funds, and the reprogramming that may be necessitated in this case has clearly been contemplated by Congress by its enacting of the provisions at issue in the first place.

St. Regis Mohawk, 2002 WL 125183, op. at 9-10. These cases are no different. That reasoning is a complete answer to the Secretary's reduction clause argument and the claim should be rejected.[17]

CONCLUSION

For the foregoing reasons, the decision in *Thompson*, No. 03-853 should be affirmed and the decision in *Cherokee*, No. 02-1472 should be reversed.

[17] The Federal Circuit correctly rejected the Government's attempt to avoid liability by invoking the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7. *Thompson*, Pet. 34a-35a. The Secretary entered into statutorily-authorized contract obligations which he then breached. The Tribes then submitted CDA claims seeking "money damages," as authorized by law. 25 U.S.C. 450m-1(a), (d). By law, CDA damage awards are payable from the Judgment Fund created under 31 U.S.C. 1304(a), *see also Bath Iron*, 20 F.3d at 1583; *Lee*, 129 F.3d at 1484, and the permanent Judgment Fund is certainly an "Appropriation[ ] made by law" under Article I. The Appropriations Clause presents no bar to damage awards in these cases.

Respectfully submitted,

CARTER G. PHILLIPS
STEPHEN B. KINNAIRD
HOWARD J. STANISLAWSKI
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

* Counsel of Record

LLOYD B. MILLER *
ARTHUR LAZARUS, JR., PC
HARRY R. SACHSE
WILLIAM R. PERRY
MELANIE B. OSBORNE
AARON M. SCHUTT
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for Cherokee Nation and Shoshone-Paiute Tribes

APPENDIX

TABLE OF CONTENTS
TO STATUTORY PROVISIONS INVOLVED

		Page
1.	The Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, §§ 1-11, 88 Stat. 2203, as amended ("Title I"), reprinted in 25 U.S.C. 450-450n (excerpts)	1a
2.	The Judgment Fund Act, 31 U.S.C. 1304 (excerpts)	28a
3.	The Anti-Deficiency Act, 31 U.S.C. 1341 (excerpts)	30a
4.	31 U.S.C. 1552, 1553 (excerpts)	31a
5.	The Contract Disputes Act, 41 U.S.C. 601-613 (excerpts)	32a
6.	The Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. 102-381, 106 Stat. 1374, 1407-1408 (1992)	36a
7.	The Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. 103-138, 107 Stat. 1379, 1390-1391, 1408 (1993)	38a
8.	The Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. 103-332, 108 Stat. 2499, 2510-2511, 2527-2528 (1994)	42a
9.	The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1321-169-171, 1321-189 (1996)	46a
10.	The Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009, 3009-192-193, 3009-212-213 (1996)	50a
11.	The Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. 105-83, 111 Stat. 1543, 1554-1555, 1582-1583 (1997)	54a

TABLE OF CONTENTS—Continued

Page

12. The Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681, 2681-245-246, 2681-278-279, 2681-288, 2681-291-292 (1998) 58a

13. The Consolidated Appropriations Act, 2000, Pub. L. 106-113, 113 Stat. 1501, 1501A-148-149, 1501A-181-182, 1501A-192 (1999)..... 63a

STATUTORY PROVISIONS INVOLVED

1. The Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450-450n, provides in relevant part as follows:

§ 450. Congressional statement of findings

(a) [Findings respecting historical and special legal relationship, and resultant responsibilities]*

The Congress, after careful review of the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that–

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

* * * * *

* Bracketed headings added by codifers.

§ 450a. Congressional declaration of policy

(a) [Recognition of obligation of United States]*

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) [Declaration of commitment]*

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

* * * * *

§ 450b. Definitions

For purposes of this subchapter, the term –

* * * * *

* Bracketed headings added by codifers.

(f) "indirect costs" means costs incurred for a common or joint purpose benefitting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved;

(g)"indirect cost rate" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

* * * * *

(i) "Secretary", unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided*, That except as provided the last proviso in section 450j(a) of this title, no contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;

* * * * *

* Bracketed headings added by codifers.

§ 450f. Self-determination contracts

(a) [Request by tribe; authorized programs]*

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs–

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. 452 et seq.];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C. 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C. 2001 et seq.];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative

* Bracketed headings added by codifers.

functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that–

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title; or

* Bracketed headings added by codifers.

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

* * * * *

(b) [Procedure upon refusal of request to contract]*

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall–

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a) of this title.

* * * * *

* Bracketed headings added by codifers.

(d) [Tribal organizations and Indian contractors deemed part of Public Health Service]*

For purposes of section 233 of Title 42, with respect to claims by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by Federal law or regulations for personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, or for purposes of section 2679, Title 28, with respect to claims by any such person, on or after November 29, 1990, for personal injury, including death, resulting from the operation of an emergency motor vehicle, an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under sections 450f or 450h of this title is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of Title 28, and including an individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided,* That such employees shall be deemed to be acting within the scope of their employment in carrying out such contract or agreement when they are required, by reason of such employment, to perform medical, surgical, dental or related functions at a facility other than the facility operated pursuant to such contract or agreement, but only if such employees are not compensated for the per-

* Bracketed headings added by codifers.

formance of such functions by a person or entity other than such Indian tribe, tribal organization or Indian contractor.

(e) [Burden of proof at hearing or appeal declining contract; final agency action]*

(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) of this section or any civil action conducted pursuant to section 450m-1(a) of this title, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

(2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the "Department") that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) of this section shall be made either–

(A) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

(B) by an administrative judge.

* * * * *

* Bracketed headings added by codifers.

§ 450j. Contract or grant provisions and administration

(a) [Applicability of Federal contracting laws and regulations; waiver of requirements]*

(1) Notwithstanding any other provision of law, subject to paragraph (3), the contracts and cooperative agreements entered into with tribal organizations pursuant to section 450f of this title shall not be subject to Federal contracting or cooperative agreement laws (including any regulations), except to the extent that such laws expressly apply to Indian tribes.

(2) Program standards applicable to a non-construction self-determination contract shall be set forth in the contract proposal and the final contract of the tribe or tribal organization.

(3)(A) With respect to a construction contract (or a subcontract of such a construction contract), the provisions of the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) and the regulations relating to acquisitions promulgated under such Act shall apply only to the extent that the application of such provision to the construction contract (or subcontract) is–

(i) necessary to ensure that the contract may be carried out in a satisfactory manner;

(ii) directly related to the construction activity; and

(iii) not inconsistent with this subchapter.

(B) A list of the Federal requirements that meet the requirements of clauses (i) through (iii) of subparagraph (A) shall be included in an attachment to the contract pursuant

* Bracketed headings added by codifers.

to negotiations between the Secretary and the tribal organization.

(C)(i) Except as provided in subparagraph (B), no Federal law listed in clause (ii) or any other provision of Federal law (including an Executive order) relating to acquisition by the Federal Government shall apply to a construction contract that a tribe or tribal organization enters into under this subchapter, unless expressly provided in such law.

(ii) The laws listed in this paragraph are as follows:

(I) The Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.).

(II) Section 3709 of the Revised Statutes [41 U.S.C. 5].

(III) Section 9(c) of the Act of Aug. 2, 1946 (60 Stat. 809, chapter 744).

(IV) Title III of the Federal Property and Administrative Services Act of 1949 (63 Stat. 393 et seq., chapter 288) [41 U.S.C. 251 et seq.].

(V) Section 13 of the Act of Oct. 3, 1944 (58 Stat. 770; chapter 479) [50 App. U.S.C. 1622].

(VI) Chapters 21, 25, 27, 29, and 31 of Title 44.

(VII) Section 2 of the Act of June 13, 1934 (48 Stat. 948, chapter 483)[40 U.S.C. 276c].

(VIII) Sections 1 through 12 of the Act of June 30, 1936 (49 Stat. 2036 et seq. chapter 881) [41 U.S.C. 35-45].

* Bracketed headings added by codifers.

(IX) The Service Control Act of 1965 (41 U.S.C. 351 et seq.).

(X) The Small Business Act (15 U.S.C. 631 et seq.).

(XI) Executive Order Nos. 12138, 11246, 11701 and 11758.

(b) [Payments; transfer of funds by Treasury for disbursement by tribal organization; accountability for interest accrued prior to disbursement]*

Payments of any grants or under any contracts pursuant to sections 450f and 450h of this title may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this part. The transfer of funds shall be scheduled consistent with program requirements and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds. Tribal organizations shall not be held accountable for interest earned on such funds, pending their disbursement by such organization.

(c) [Term of self-determination contracts; annual renegotiation]*

(1) A self-determination contract shall be–

(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate

* Bracketed headings added by codifers.

Secretary and the tribe agree that a longer term would be advisable, and

(B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

The amounts of such contracts shall be subject to the availability of appropriations.

(2) The amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization.

* * * * *

§ 450j-1. Contract funding and indirect costs

(a) [Amount of funds provided]*

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be

* Bracketed headings added by codifers.

carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which–

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of–

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

* * * * *

* Bracketed headings added by codifers.

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary–

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) [Reductions and increases in amount of funds provided]*

The amount of funds required by subsection (a) of this section–

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to–

* Bracketed headings added by codifers.

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this subchapter or as provided in section 450j(c) of this title.

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

* Bracketed headings added by codifers.

(c) [Annual reports]*

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this subchapter. Such report shall include–

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this subchapter, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 450j(d) of this title.

* Bracketed headings added by codifers.

(d) [Treatment of shortfalls in indirect cost recoveries]*

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

* * * * *

(g) [Addition to contract of full amount contractor entitled; adjustment]*

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

* * * * *

* Bracketed headings added by codifers.

(*f*) [Suspension, withholding, or delay in payment of funds]*

(1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self-determination contract, if the Secretary determines that the tribal organization has failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds.

* * * * *

§ 450k. Rules and regulations

(a) [Authority of Secretaries of the Interior and of Health and Human Services to promulgate; time restriction]*

(1) Except as may be specifically authorized in this subsection, or in any other provision of this subchapter, the Secretary of the Interior and the Secretary of Health and Human Services may not promulgate any regulation, nor

* Bracketed headings added by codifers.

impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts, except that the Secretary of the Interior and the Secretary of Health and Human Services may promulgate regulations under this subchapter relating to chapter 171 of Title 28, commonly known as the "Federal Tort Claims Act", the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.), declination and waiver procedures, appeal procedures, reassumption procedures, discretionary grant procedures for grants awarded under section 450h of this title, property donation procedures arising under section 450j(f) of this title, internal agency procedures relating to the implementation of this subchapter, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards, and financial management standards.

(2)(A) The regulations promulgated under this subchapter, including the regulations referred to in this subsection, shall be promulgated–

(i) in conformance with sections 552 and 553 of title 5 and subsections (c), (d), and (e) of this section; and

(ii) as a single set of regulations in title 25 of the Code of Federal Regulations.

(B) The authority to promulgate regulations set forth in this subchapter shall expire if final regulations are not promulgated within 20 months after October 25, 1994.

* * * * *

* Bracketed headings added by codifers.

§ 450*l*. Contract or grant specifications

(a) [Terms]*

Each self-determination contract entered into under this subchapter shall–

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section (with modifications where indicated and the blanks appropriately filled in), and

(2) contain such other provisions as are agreed to by the parties.

* * * * *

(c) [Model agreement]*

The model agreement referred to in subsection (a)(1) of this section reads as follows:

"Section 1. Agreement between the Secretary and the _____ Tribal Government.

"(a) Authority and Purpose.–

"(1) Authority.–This agreement, denoted a Self-Determination Contract (referred to in this agreement as the 'Contract'), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the 'Secretary'), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and by the authority of the _____ tribal government or tribal organization (referred to in this agreement as the 'Contractor'). The

* Bracketed headings added by codifers.

provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated in this agreement.

"(2) Purpose.–Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

"(b) Terms, Provisions, and Conditions.–

* * * * *

"(2) Effective date.–This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

* * * * *

"(4) Funding amount.–Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

* Bracketed headings added by codifers.

"(5) Limitation of costs.–The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the contract until such time as additional funds are awarded.

"(6) Payment.–

"(A) In general.–Payments to the Contractor under this Contract shall–

"(i) be made as expeditiously as practicable; and

"(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

"(B) Quarterly, semiannual, lump-sum, and other methods of payment.–

"(i) In general.–Pursuant to section 108(b) of the Indian Self-Determination and Education Assistance Act, and notwithstanding any other provision of law, for each fiscal year covered by this Contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year

* Bracketed headings added by codifers.

under the annual funding agreement incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement.

"(ii) Method of quarterly payment.–If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection (f)(2), each quarterly payment made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the Contract year coincides with the Federal fiscal year, payment for the first quarter shall be made not later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions, and activities subject to this Contract.

"(iii) Applicability.–Chapter 39 of title 31, United States Code, shall apply to the payment of funds due under this Contract and the annual funding agreement referred to in clause (i).

* * * * *

"(11) Federal program guidelines, manuals, or policy directives.–Except as specifically provided in the Indian Self-Determination and Education Assistance Act

* Bracketed headings added by codifers.

(25 U.S.C. 450 et seq.) the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

* * * * *

"(c) Obligation of the Contractor.–

"(1) Contract performance.–Except as provided in subsection (d)(2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (f)(2) of this Contract.

"(2) Amount of funds.–The total amount of funds to be paid under this Contract pursuant to section 106(a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

"(3) Contracted programs.–Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this Contract and funded through the annual funding agreement under subsection (f)(2).

* * * * *

"(d) Obligation of the United States.–

"(1) Trust responsibility.–

* * * * *

* Bracketed headings added by codifers.

"(B) Construction of Contract.–Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility.

"(2) Good faith.–To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.).

* * * * *

"(e) Other provisions.–

* * * * *

"(2) Contract modifications or amendment.–

"(A) In general.–Except as provided in subparagraph (B), no modification to this Contract shall take effect unless such modification is made in the form of a written amendment to the Contract, and the Contractor and the Secretary provide written consent for the modification.

"(B) Exception.–The addition of supplemental funds for programs, functions, and activities (or portions thereof) already included in the annual funding agreement under subsection (f)(2), and the reduction of funds pursuant to section 106(b)(2), shall not be subject to subparagraph (A).

* * * * *

* Bracketed headings added by codifers.

"(f) Attachments.–

* * * * *

"(2) Annual funding agreement.–

"(A) In general.–The annual funding agreement under this Contract shall only contain–

"(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

"(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

"(B) Incorporation by reference.–The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2."

* * * * *

§ 450m-1. Contract disputes and claims.

(a) [Civil actions; concurrent jurisdiction; relief]*

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and,

* Bracketed headings added by codifers.

subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

(b) [Revision of contracts]*

The Secretary shall not revise or amend a self-determination contract with a tribal organization without the tribal organization's consent.

* * * * *

(d) [Application of Contract Disputes Act]*

The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) [41 U.S.C. 601 et seq.] shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

* * * * *

* Bracketed headings added by codifers.

§ 450n. Sovereign immunity and trusteeship rights unaffected

Nothing in this subchapter shall be construed as–

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

* * * * *

2. The Judgment Fund Act, 31 U.S.C. 1304, provides in relevant part as follows:

§ 1304. Judgments, awards, and compromise settlements

(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when–

(1) payment is not otherwise provided for;

(2) payment is certified by the Secretary of the Treasury; and

(3) the judgment, award, or settlement is payable–

(A) under section 2414, 2517, 2672, or 2677 of title 28;

(B) under section 3723 of this title;

* Bracketed headings added by codifers.

(C) under a decision of a board of contract appeals; or

(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2473)

(b)(1)Interest may be paid from the appropriation made by this section–

(A) on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Secretary of the Treasury through the day before the date of the mandate of affirmance; or

(B) on a judgment of the Court of Appeals for the Federal Circuit or the United States Court of Federal Claims under section 2516(b) of title 28, only from the date of filing of the transcript of the judgment with the Secretary of the Treasury through the day before the date of the mandate of affirmance.

(2) Interest payable under this subsection in a proceeding reviewed by the Supreme Court is not allowed after the end of the term in which the judgment is affirmed.

(c)(1)A judgment or compromise settlement against the Government shall be paid under this section and sections 2414, 2517, and 2518 of title 28 when the judgment or settlement arises out of an express or implied contract made by–

(A) the Army and Air Force Exchange Service;

(B) the Navy Exchanges;

(C) the Marine Corps Exchanges;

(D) the Coast Guard Exchanges; or

(E) the Exchange Councils of the National Aeronautics and Space Administration.

(2) The Exchange making the contract shall reimburse the Government for the amount paid by the Government.

* * * * *

3. The Anti-Deficiency Act, 31 U.S.C. 1341, provides in relevant part as follows:

§ 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not–

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be

sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

* * * * *

4. 31 U.S.C. 1552, 1553, provide in relevant part as follows:

§ 1552. Procedure for appropriation accounts available for definite periods

(a) On September 30th of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose.

* * * * *

§ 1553. Availability of appropriation accounts to pay obligations

(a) After the end of the period of availability for obligation of a fixed appropriation account and before the closing of that account under section 1552(a) of this title, the account shall

retain its fiscal-year identity and remain available for recording, adjusting, and liquidating obligations properly chargeable to that account.

* * * * *

5. The Contract Disputes Act, 41 U.S.C. 601-613, provides in relevant part as follows:

§ 602. Applicability of law

(a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for–

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

* * * * *

§ 605. Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the

contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(c) Amount of claim; certification; notification; time of issuance; presumption

* * * * *

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

* * * * *

§ 606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

§ 607. Agency boards of contract appeals

* * * * *

(d) Jurisdiction

Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the

appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

* * * * *

(g) Review

(1) The decision of an agency board of contract appeals shall be final, except that–

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of Title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

* * * * *

§ 612. Payment of claims

(a) Judgments

Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of Title 31.

(b) Monetary awards

Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.

(c) Reimbursement

Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of Title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

* * * * *

6. The Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. 102-381, 106 Stat. 1374, 1407-1408 (1992), provides in relevant part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 1993, and for other purposes, namely:

* * * * *

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles III and XXVI and section 208 of the Public Health Service Act with respect

to the Indian Health Service, including hire of passenger motor vehicles and aircraft; purchase of medical equipment; purchase of reprints; purchase, renovation, and erection of modular buildings; payments for telephone service in private residences in the field, when authorized under regulations approved by the Secretary; $1,537,851,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 300aaa-2 for services furnished by the Indian Health Service: *Provided*, That notwithstanding any other law or regulation, funds transferred from the Department of Housing and Urban Development to the Indian Health Service shall be administered under Public Law 86-121 (the Indian Sanitation Facilities Act): *Provided further*, That funds made available to tribes and tribal organizations through grants and contracts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further*, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $320,827,000 for contract medical care shall remain available for obligation until September 30, 1994: *Provided further*, That of the funds provided, not less than $11,077,000 shall be used to carry out a loan repayment program under which Federal, State, and commercial-type educational loans for physicians and other health professionals will be repaid at a rate not to exceed $35,000 per year of obligated service in return for full-time clinical service: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement

Act shall be available for two fiscal years after the fiscal year in which they were collected, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That of the funds provided, $5,000,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1994: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act and Public Law 100-713 shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

* * * * *

7. The Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. 103-138, 107 Stat. 1379, 1390-1391, 1408 (1993), provides in relevant part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 1994, and for other purposes, namely:

DEPARTMENT OF THE INTERIOR

* * * * *

BUREAU OF INDIAN AFFAIRS

OPERATION OF INDIAN PROGRAMS

For operation of Indian programs by direct expenditure, contracts, cooperative agreements, and grants including expenses necessary to provide education and welfare services for Indians, either directly or in cooperation with States and other organizations, including payment of care, tuition, assistance, and other expenses of Indians in boarding homes, or institutions, or schools; grants and other assistance to needy Indians; maintenance of law and order; management, development, improvement, and protection of resources and appurtenant facilities under the jurisdiction of the Bureau of Indian Affairs, including payment of irrigation assessments and charges; acquisition of water rights; advances for Indian industrial and business enterprises; operation of Indian arts and crafts shops and museums; development of Indian arts and crafts, as authorized by law; for the general administration of the Bureau of Indian Affairs, including such expenses in field offices; maintaining of Indian reservation roads as defined in section 101 of title 23, United States Code; and construction, repair, and improvement of Indian housing, $1,490,805,000, including $316,111,000 for school operations costs of Bureau-funded schools and other education programs which shall become available for obligation on July 1, 1994, and shall remain available for obligation until September 30, 1995, and $49,226,000 for housing and road maintenance programs, to remain available until expended, and of which, payments of funds obligated as grants to schools pursuant to Public Law 100-297 shall be made on July 1 and December 1 in lieu of the payments

authorized to be made on October 1 and January 1 of each calendar year, and of which not to exceed $74,764,000 for higher education scholarships, adult vocational training, and assistance to public schools under the Act of April 16, 1934 (48 Stat. 596), as amended (25 U.S.C. 452 et seq.), shall remain available for obligation until September 30, 1995; and the funds made available to tribes and tribal organizations through contracts or grants obligated during fiscal year 1994 as authorized by the Indian Self-Determination Act of 1975 (88 Stat. 2203; 25 U.S.C. 450 et seq.), or grants authorized by the Indian Education Amendments of 1988 (25 U.S.C. 2001 and 2008A) shall remain available until expended by the contractor or grantee; and of which $1,983,000 for litigation support shall remain available until expended, $4,934,000 for self-governance tribal compacts shall be made available on completion and submission of such compacts to the Congress, and shall remain available until expended; and of which $1,179,000 for expenses necessary to carry out the provisions of section 19(a) of Public Law 93-531 (25 U.S.C. 640d-18(a)), shall remain available until expended: *Provided*, That none of the funds appropriated to the Bureau of Indian Affairs shall be expended as matching funds for programs funded under section 103(b)(2) of the Carl D. Perkins Vocational Education Act: *Provided further*, That of the amount appropriated under this head in Public Law 102-381, any unobligated balance as of September 30, 1993 related to the Alaska Native Claims Settlement Act shall remain available until expended and may be obligated under a grant to the Alaska Native Foundation for education, training, and technical assistance to Alaskan village corporations for reconveyance requirements: *Provided further*, That $199,000 of the funds made available in this Act shall be available for cyclical maintenance of tribally owned fish hatcheries and related facilities: *Provided further*, That not to exceed $91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs

associated with contracts or grants or compacts authorized by the Indian Self-Determination Act of 1975, as amended, for fiscal year 1994 and previous years: * * *.

* * * * *

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles III and XXVII and section 208 of the Public Health Service Act with respect to the Indian Health Service, $1,645,877,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 300aaa-2 for services furnished by the Indian Health Service: *Provided*, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further*, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $337,848,000 for contract medical care shall remain available for obligation until September 30, 1995: *Provided further*, That of the funds provided, not less than $11,526,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act, as amended: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated:

Provided further, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall be available for two fiscal years after the fiscal year in which they were collected, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1995: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act, as amended, shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

* * * * *

8. The Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. 103-332, 108 Stat. 2499, 2510-2511, 2527-2528 (1994), provides in relevant part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 1995, and for other purposes, namely:

DEPARTMENT OF THE INTERIOR

* * * * *

BUREAU OF INDIAN AFFAIRS

OPERATION OF INDIAN PROGRAMS

For operation of Indian programs by direct expenditure, contracts, cooperative agreements, and grants including expenses necessary to provide education and welfare services for Indians, either directly or in cooperation with States and other organizations, including payment of care, tuition, assistance, and other expenses of Indians in boarding homes, or institutions, or schools; grants and other assistance to needy Indians; maintenance of law and order; management, development, improvement, and protection of resources and appurtenant facilities under the jurisdiction of the Bureau of Indian Affairs, including payment of irrigation assessments and charges; acquisition of water rights; advances for Indian industrial and business enterprises; operation of Indian arts and crafts shops and museums; development of Indian arts and crafts, as authorized by law; for the general administration of the Bureau of Indian Affairs, including such expenses in field offices; maintaining of Indian reservation roads as defined in section 101 of title 23, United States Code; and construction, repair, and improvement of Indian housing, $1,526,778,000, of which $208,000 shall be for cyclical maintenance of tribally owned fish hatcheries and related facilities; and of which $297,000 shall be for a grant to the Close Up Foundation; and of which not to exceed $95,823,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts authorized by the Indian Self-Determination Act of 1975, as amended: *Provided*, That tribes and tribal contractors may use their tribal priority allocations for unmet contract support costs of ongoing contracts, grants or compact agreements; and of

which not to exceed $330,111,000 shall be for school operations costs of Bureau-funded schools and other education programs which shall become available for obligation on July 1, 1995, and shall remain available for obligation until September 30, 1996; and of which not to exceed $72,580,000 shall be for higher education scholarships, adult vocational training, and assistance to public schools under the Act of April 16, 1934 (48 Stat. 596), as amended (25 U.S.C. 452 et seq.), which shall remain available for obligation until September 30, 1996; and of which $75,902,000 shall remain available until expended, including $16,206,000 for trust funds management, $19,083,000 for housing improvement, $30,169,000 for road maintenance, $2,332,000 for attorney fees, $1,983,000 for litigation support, $4,934,000 for self-governance tribal compacts, and $1,195,000 for the Navajo-Hopi Settlement Program: *Provided*, That payments of funds obligated as grants to schools pursuant to Public Law 100-297 shall be made not later than July 15 and December 1 in lieu of the payments authorized to be made on October 1 and January 1 of each calendar year: *Provided further*, That funds made available to tribes and tribal organizations through contracts or grants obligated during fiscal year 1995 as authorized by the Indian Self-Determination Act of 1975 (88 Stat. 2203; 25 U.S.C. 450 et seq.), or grants authorized by the Indian Education Amendments of 1988 (25 U.S.C. 2001 and 2008A) shall remain available until expended by the contractor or grantee: *Provided further*, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Bureau of Indian Affairs under the provisions of the Indian Self-Determination Act: * * *.

* * * * *

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles III and XXVII and section 208 of the Public Health Service Act with respect to the Indian Health Service, $1,713,052,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 300aaa-2 for services furnished by the Indian Health Service: *Provided*, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further*, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $351,258,000 for contract medical care shall remain available for obligation until September 30, 1996: *Provided further*, That of the funds provided, not less than $11,603,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act, as amended: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall be available for two fiscal years after the fiscal year in which they were collected, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and

XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1996: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act, as amended, shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

* * * * *

9. The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1321-169-171, 1321-189 (1996), provides in relevant part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

Making appropriations for the Departments of the Interior and related agencies for the fiscal year ending September 30, 1996, and for other purposes.

DEPARTMENT OF THE INTERIOR

* * * * *

BUREAU OF INDIAN AFFAIRS

OPERATION OF INDIAN PROGRAMS

For operation of Indian programs by direct expenditure, contracts, cooperative agreements, compacts, and grants including expenses necessary to provide education and welfare services for Indians, either directly or in cooperation with States and other organizations, including payment of care, tuition, assistance, and other expenses of Indians in boarding homes, or institutions, or schools; grants and other assistance to needy Indians; maintenance of law and order; management, development, improvement, and protection of resources and appurtenant facilities under the jurisdiction of the Bureau of Indian Affairs, including payment of irrigation assessments and charges; acquisition of water rights; advances for Indian industrial and business enterprises; operation of Indian arts and crafts shops and museums; development of Indian arts and crafts, as authorized by law; for the general administration of the Bureau of Indian Affairs, including such expenses in field offices; maintaining of Indian reservation roads as defined in section 101 of title 23, United States Code; and construction, repair, and improvement of Indian housing, $1,384,434,000, of which not to exceed $100,255,000 shall be for welfare assistance grants and not to exceed $104,626,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts entered into with the Bureau of Indian Affairs prior to fiscal year 1996, as authorized by the Indian Self-Determination Act of 1975, as amended, and up to $5,000,000 shall be for the Indian Self-Determination Fund, which shall be available

for the transitional cost of initial or expanded tribal contracts, grants, compacts, or cooperative agreements with the Bureau of Indian Affairs under the provisions of the Indian Self-Determination Act; and of which not to exceed $330,711,000 for school operations costs of Bureau-funded schools and other education programs shall become available for obligation on July 1, 1996, and shall remain available for obligation until September 30, 1997; and of which not to exceed $68,209,000 for higher education scholarships, adult vocational training, and assistance to public schools under the Act of April 16, 1934 (48 Stat. 596), as amended (25 U.S.C. 452 et seq.), shall remain available for obligation until September 30, 1997; and of which not to exceed $71,854,000 shall remain available until expended for housing improvement, road maintenance, attorney fees, litigation support, self-governance grants, the Indian Self-Determination Fund, and the Navajo-Hopi Settlement Program: *Provided*, That tribes and tribal contractors may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants or compact agreements: *Provided further*, That funds made available to tribes and tribal organizations through contracts or grants obligated during fiscal year 1996, as authorized by the Indian Self-Determination Act of 1975 (88 Stat. 2203; 25 U.S.C. 450 et seq.), or grants authorized by the Indian Education Amendments of 1988 (25 U.S.C. 2001 and 2008A) shall remain available until expended by the contractor or grantee: *Provided further*, That to provide funding uniformity within a Self-Governance Compact, any funds provided in this Act with availability for more than one year may be reprogrammed to one year availability but shall remain available within the Compact until expended: * * *.

* * * * *

Provided further, That of the funds available only through September 30, 1995, not to exceed $8,000,000 in unobligated and unexpended balances in the Operation of Indian Programs account shall be merged with and made a part of the fiscal year 1996 Operation of Indian Programs appropriation, and shall remain available for obligation for employee severance, relocation, and related expenses, until September 30, 1996.

* * * * *

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,747,842,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 300aaa-2 for services furnished by the Indian Health Service: *Provided*, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further*, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $350,564,000 for contract medical care shall remain available for obligation until September 30, 1997: *Provided further*, That of the funds provided, not less than $11,306,000 shall be used to carry out the loan repayment program under section

108 of the Indian Health Care Improvement Act, as amended: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall be available for two fiscal years after the fiscal year in which they were collected, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1997: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act, as amended, shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

* * * * *

10. The Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009, 3009-192-193, 3009-212-213 (1996), provides in relevant part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

Making appropriations for the Department of the Interior, and related agencies for the fiscal year ending September 30, 1997, and for other purposes.

DEPARTMENT OF THE INTERIOR

* * * * *

BUREAU OF INDIAN AFFAIRS

OPERATION OF INDIAN PROGRAMS

For operation of Indian programs by direct expenditure, contracts, cooperative agreements, compacts, and grants including expenses necessary to provide education and welfare services for Indians, either directly or in cooperation with States and other organizations, including payment of care, tuition, assistance, and other expenses of Indians in boarding homes, or institutions, or schools; grants and other assistance to needy Indians; maintenance of law and order; management, development, improvement, and protection of resources and appurtenant facilities under the jurisdiction of the Bureau, including payment of irrigation assessments and charges; acquisition of water rights; advances for Indian industrial and business enterprises; operation of Indian arts and crafts shops and museums; development of Indian arts and crafts, as authorized by law; for the general administration of the Bureau, including such expenses in field offices; maintaining of Indian reservation roads as defined in 23 U.S.C. 101; and construction, repair, and improvement of Indian housing, $1,436,902,000, of which not to exceed $86,520,000 shall be for welfare assistance payments and not to exceed $90,829,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts entered into with the Bureau prior to fiscal year 1997, as authorized by the Indian

Self-Determination Act of 1975, as amended, and up to $5,000,000 shall be for the Indian Self-Determination Fund, which shall be available for the transitional cost of initial or expanded tribal contracts, grants, compacts, or cooperative agreements with the Bureau under such Act; and of which not to exceed $365,124,000 for school operations costs of Bureau-funded schools and other education programs shall become available on July 1, 1997, and shall remain available until September 30, 1998; and of which not to exceed $53,805,000 for higher education scholarships, adult vocational training, and assistance to public schools under 25 U.S.C. 452 et seq., shall remain available until September 30, 1998; and of which not to exceed $54,973,000 shall remain available until expended for housing improvement, road maintenance, attorney fees, litigation support, self-governance grants, the Indian Self-Determination Fund, and the Navajo-Hopi Settlement Program: *Provided*, That tribes and tribal contractors may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants or compact agreements and for unmet welfare assistance costs: *Provided further*, That funds made available to tribes and tribal organizations through contracts or grants obligated during fiscal year 1997, as authorized by the Indian Self-Determination Act of 1975, or grants authorized by the Indian Education Amendments of 1988 (25 U.S.C. 2001 and 2008A) shall remain available until expended by the contractor or grantee: *Provided further*, That to provide funding uniformity within a Self-Governance Compact, any funds provided in this Act with availability for more than one year may be reprogrammed to one year availability but shall remain available within the Compact until expended: * * *.

* * * * *

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,806,269,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 238(b) for services furnished by the Indian Health Service: *Provided*, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further*, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $356,325,000 for contract medical care shall remain available for obligation until September 30, 1998: *Provided further*, That of the funds provided, not less than $11,706,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall remain available until expended for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or

construction of new facilities): *Provided further*, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, compacts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1998: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

* * * * *

11. The Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. 105-83, 111 Stat. 1543, 1554-1555, 1582-1583 (1997), provides in relevant part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 1998, and for other purposes, namely:

DEPARTMENT OF THE INTERIOR

* * * * *

BUREAU OF INDIAN AFFAIRS

OPERATION OF INDIAN PROGRAMS

For operation of Indian programs by direct expenditure, contracts, cooperative agreements, compacts, and grants including expenses necessary to provide education and welfare services for Indians, either directly or in cooperation with States and other organizations, including payment of care, tuition, assistance, and other expenses of Indians in boarding homes, or institutions, or schools; grants and other assistance to needy Indians; maintenance of law and order; management, development, improvement, and protection of resources and appurtenant facilities under the jurisdiction of the Bureau, including payment of irrigation assessments and charges; acquisition of water rights; advances for Indian industrial and business enterprises; operation of Indian arts and crafts shops and museums; development of Indian arts and crafts, as authorized by law; for the general administration of the Bureau, including such expenses in field offices; maintaining of Indian reservation roads as defined in 23 U.S.C. 101; and construction, repair, and improvement of Indian housing, $1,528,588,000, to remain available until September 30, 1999 except as otherwise provided herein, of which not to exceed $93,825,000 shall be for welfare assistance payments and not to exceed $105,829,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts entered into with the Bureau prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended, and up to $5,000,000 shall be for the Indian Self-Determination Fund, which shall be available for

the transitional cost of initial or expanded tribal contracts, grants, compacts, or cooperative agreements with the Bureau under such Act; and of which not to exceed $374,290,000 for school operations costs of Bureau-funded schools and other education programs shall become available on July 1, 1998, and shall remain available until September 30, 1999; and of which not to exceed $55,949,000 shall remain available until expended for housing improvement, road maintenance, attorney fees, litigation support, self-governance grants, the Indian Self-Determination Fund, land records improvements and the Navajo-Hopi Settlement Program: *Provided*, That tribes and tribal contractors may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants or compact agreements and for unmet welfare assistance costs: *Provided further*, That funds made available to tribes and tribal organizations through contracts, compact agreements, or grants obligated during fiscal years 1998 and 1999, as authorized by the Indian Self-Determination Act of 1975, or grants authorized by the Indian Education Amendments of 1988 (25 U.S.C. 2001 and 2008A) shall remain available until expended by the contractor or grantee: *Provided further*, That to provide funding uniformity within a Self-Governance Compact, any funds provided in this Act with availability for more than two years may be reprogrammed to two year availability but shall remain available within the Compact until expended: * * *.

* * * * *

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of

the Public Health Service Act with respect to the Indian Health Service, $1,841,074,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 238(b) for services furnished by the Indian Health Service: *Provided*, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further*, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $361,375,000 for contract medical care shall remain available for obligation until September 30, 1999: *Provided further*, That of the funds provided, not less than $11,889,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall remain available until expended for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, compacts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: *Provided*

further, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1999: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended: *Provided further*, That not to exceed $168,702,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts entered into with the Indian Health Service prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended.

* * * * *

12. The Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681, 2681-245-246, 2681-278-279, 2681-288, 2681-291-292 (1998), provides in relevant part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

AN ACT Making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1999, and for other purposes.

DEPARTMENT OF THE INTERIOR

* * * * *

BUREAU OF INDIAN AFFAIRS

OPERATION OF INDIAN PROGRAMS

For expenses necessary for the operation of Indian programs, as authorized by law, including the Snyder Act of November 2, 1921 (25 U.S.C. 13), the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, the Education Amendments of 1978 (25 U.S.C. 2001-2019), and the Tribally Controlled Schools Act of 1988 (25 U.S.C. 2501 et seq.), as amended, $1,584,124,000, to remain available until September 30, 2000 except as otherwise provided herein, of which not to exceed $94,010,000 shall be for welfare assistance payments and notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $114,871,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 1999, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs, and of which not to exceed $387,365,000 for school operations costs of Bureau-funded schools and other education programs shall become available on July 1, 1999, and shall remain available until September 30, 2000; and of which not to exceed $52,889,000 shall remain available until expended for housing improvement, road maintenance, attorney fees, litigation support, self-governance grants, the Indian Self-

Determination Fund, land records improvement, the Navajo-Hopi Settlement Program: *Provided*, That notwithstanding any other provision of law, including but not limited to the Indian Self- Determination Act of 1975, as amended, and 25 U.S.C. 2008, not to exceed $42,160,000 within and only from such amounts made available for school operations shall be available to tribes and tribal organizations for administrative cost grants associated with the operation of Bureau-funded schools: *Provided further*, That hereafter funds made available to tribes and tribal organizations through contracts, compact agreements, or grants, as authorized by the Indian Self-Determination Act of 1975 or grants authorized by the Indian Education Amendments of 1988 (25 U.S.C. 2001 and 2008A) shall remain available until expended by the contractor or grantee: *Provided further*, That hereafter, to provide funding uniformity within a Self-Governance Compact, any funds provided in this Act with availability for more than two years may be reprogrammed to two year availability but shall remain available within the Compact until expended: * * *.

* * * * *

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,950,322,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 238(b) for services furnished by the Indian Health Service: *Provided*, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and

Education Assistance Act of 1975 (25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further*, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $373,801,000 for contract medical care shall remain available for obligation until September 30, 2000: *Provided further*, That of the funds provided, up to $17,000,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall remain available until expended for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 2000: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended: *Provided further*, That, notwithstanding any other provision of law, of the amounts provided herein, not to exceed $203,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs associated with contracts, grants, self-governance compacts or annual funding agree-

ments between the Indian Health Service and a tribe or tribal organization pursuant to the Indian Self-Determination Act of 1975, as amended, prior to or during fiscal year 1999: *Provided further*, That funds provided to the Ponca Indian Tribe of Nebraska in previous fiscal years that were retained by the tribe to carry out the programs and functions of the Indian Health Service may be used by the tribe to obtain approved clinical space to carry out the program.

* * * * *

SEC. 314. Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, except that, for the Bureau of Indian Affairs, tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.

* * * * *

SEC. 328. Notwithstanding any other provision of law, none of the funds in this Act may be used to enter into any new or expanded self-determination contract or grant or self-governance compact pursuant to the Indian Self-Determination Act of 1975, as amended, for any activities not previously covered by such contracts, compacts or grants. Nothing in this section precludes the continuation of those

specific activities for which self-determination and self-governance contracts, compacts and grants currently exist or the renewal of contracts, compacts and grants for those activities; implementation of section 325 of Public Law 105-83 (111 Stat. 1597); or compliance with 25 U.S.C. 2005.

* * * * *

13. The Consolidated Appropriations Act, 2000, Pub. L. 106-113, 113 Stat. 1501, 1501A-148-149, 1501A-181-182, 1501A-192 (1999), provides in relevant part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the several departments, agencies, corporations and other organizational units of the Government for the fiscal year 2000, and for other purposes, namely:

* * * * *

DEPARTMENT OF THE INTERIOR

* * * * *

BUREAU OF INDIAN AFFAIRS

OPERATION OF INDIAN PROGRAMS

For expenses necessary for the operation of Indian programs, as authorized by law, including the Snyder Act of November 2, 1921 (25 U.S.C. 13), the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, the Education Amendments

of 1978 (25 U.S.C. 2001-2019), and the Tribally Controlled Schools Act of 1988 (25 U.S.C. 2501 et seq.), as amended, $1,670,444,000, to remain available until September 30, 2001 except as otherwise provided herein, of which not to exceed $93,684,000 shall be for welfare assistance payments and notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $120,229,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2000, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs; and up to $5,000,000 shall be for the Indian Self-Determination Fund which shall be available for the transitional cost of initial or expanded tribal contracts, grants, compacts or cooperative agreements with the Bureau under such Act; and of which not to exceed $401,010,000 for school operations costs of Bureau-funded schools and other education programs shall become available on July 1, 2000, and shall remain available until September 30, 2001; and of which not to exceed $56,991,000 shall remain available until expended for housing improvement, road maintenance, attorney fees, litigation support, self-governance grants, the Indian Self-Determination Fund, land records improvement, and the Navajo-Hopi Settlement Program: *Provided*, That notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, and 25 U.S.C. 2008, not to exceed $42,160,000 within and only from such amounts made available for school operations shall be available to tribes and tribal organizations for administrative cost grants associated with the operation of Bureau-funded schools: *Provided further*, That any forestry

funds allocated to a tribe which remain unobligated as of September 30, 2001, may be transferred during fiscal year 2002 to an Indian forest land assistance account established for the benefit of such tribe within the tribe's trust fund account: *Provided further*, That any such unobligated balances not so transferred shall expire on September 30, 2002.

* * * * *

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $2,078,967,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 238(b) for services furnished by the Indian Health Service: *Provided*, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further*, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $395,290,000 for contract medical care shall remain available for obligation until September 30, 2001: *Provided further*, That of the funds provided, up to $17,000,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act: *Provided further*, That funds

provided in this Act may be used for 1-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall remain available until expended for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 2001: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended: *Provided further*, That, notwithstanding any other provision of law, of the amounts provided herein, not to exceed $228,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs associated with contracts, grants, self-governance compacts or annual funding agreements between the Indian Health Service and a tribe or tribal organization pursuant to the Indian Self-Determination Act of 1975, as amended, prior to or during fiscal year 2000, of which not to exceed $10,000,000 may be used for such costs associated with new and expanded contracts, grants, self-governance compacts or annual funding agreements: *Provided further*, That funds available for the Indian Health Care Improvement Fund may be used, as needed, to carry out activities typically funded under the Indian Health Facilities account.

* * * * *

SEC. 313. Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208, 105-83, and 105-277 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1999 for such purposes, except that, for the Bureau of Indian Affairs, tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.

* * * * *

(13) (11)

Supreme Court, U.S.
FILED
SEP - 3 2004
OFFICE OF THE CLERK

Nos. 02-1472 and 03-853

In the Supreme Court of the United States

CHEROKEE NATION OF OKLAHOMA AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, PETITIONERS

v.

UNITED STATES OF AMERICA; TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND FEDERAL CIRCUITS

BRIEF FOR THE FEDERAL PARTIES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

SRI SRINIVASAN
Assistant to the Solicitor General

BARBARA C. BIDDLE
JEFFRICA JENKINS LEE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

ALEX M. AZAR II
General Counsel

BARBARA J. HUDSON
Branch Chief

JOCELYN S. BEER
JULIA PIERCE
HILARY FRIERSON
Attorneys
Department of Health and Human Services
Washington, D.C. 20201

QUESTIONS PRESENTED

The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, authorizes the Secretary of Health and Human Services (the Secretary) to enter into contracts with Indian Tribes for the administration of programs the Secretary otherwise would administer himself. The ISDA also provides that the Secretary shall pay "contract support costs" to cover certain direct and indirect expenses incurred by the Tribes in administering those contracts. The ISDA, however, makes payment "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for contract support and other self-determination contract costs. 25 U.S.C. 450j-1(b). The questions presented are:

1. Whether the ISDA requires the Secretary to pay contract support costs associated with carrying out self-determination contracts with the Indian Health Service, where appropriations were insufficient to fully fund those costs without reprogramming funds needed for other mandatory health initiatives and for non-contractable, inherently federal functions such as having an Indian Health Service.

2. Whether Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-288, bars the Tribes from recovering their contract support costs.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement:	
I. Statutory background	2
A. General provisions of the ISDA	3
B. Funding of self-determination contracts under the ISDA	6
II. The Indian Health Service's appropriations and funding	8
A. IHS's allocation of appropriations of generally	8
B. IHS's funding for contract support costs	11
III. The current controversy	14
A. Factual background	14
B. Proceedings below	14
1. Proceedings in *Cherokee Nation*, No. 02-1472	15
2. Proceedings in *Thompson*, No. 03-853	16
Summary of argument	18
Argument:	
I. The Secretary was not required by the Indian Self-Determination Act to pay the Tribes' full contract support costs ahead of all competing priorities and at the expense of programs serving other tribes	22
A. Tribal contractors step into the shoes of a federal agency under the ISDA and therefore are subject to the same funding constraints	23

Table of Contents—Continued: Page

B. The Secretary was not required to pay the Tribes' full CSCs because to do so would have required reducing funds for programs and activities serving other tribes 27
1. IHS allocates its entire Indian Health Services lump-sum appropriation either to programs and activities serving tribes or to inherent federal functions 27
2. The Secretary was not required to make funds for inherent federal functions available to pay CSCs 29
3. The Secretary did not reduce CSC funding in order to pay for "contract administration" or "federal functions" in violation of Section 450j-1(b) 34
4. The Secretary was not required to pay for CSCs with the agency's nominal balances at the close of the fiscal year 36
C. The ISDA's availability clause contemplates more than the mere availability of a lump-sum appropriation 38
1. The text and history of the availability clause and its context within the ISDA demonstrate that the Tribes' interpretation is incorrect 38
2. The Tribes' interpretation of the appropriations acts is erroneous 44
II. Section 314 of the 1999 appropriations act bars the Tribes from recovering contract support costs for Fiscal Years 1994-1998 45

Table of Contents—Continued: Page

A. Section 314 establishes that the Secretary was not required to distribute additional CSC funds in the relevant years 45
B. The Tribes' interpretation of Section 314 is incorrect 47
Conclusion 50

TABLE OF AUTHORITIES

Cases:

Blackhawk Heating & Plumbing Co. v. *United States*, 622 F.2d 539 (Ct. Cl. 1980) 23
Bowen v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986) 50
Lorillard v. *Pons*, 434 U.S. 575 (1978) 43
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 48
Rafferty v. *Smith, Bell & Co.*, 257 U.S. 226 (1921) 49
Red Lion Broad. Co. v. *FCC*, 395 U.S. 367 (1969) 48
Robertson v. *Seattle Audubon Soc.*, 503 U.S. 429 (1992) 48
Shoshone-Bannock Tribes v. *Thompson*, 279 F.3d 660 (9th Cir. 2002) 16, 47
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 49
Swayne & Hoyt v. *United States*, 300 U.S. 297 (1937) 48, 49, 50
Train v. *New York*, 420 U.S. 35 (1975) 40
United States v. *Carlton*, 512 U.S. 26 (1994) 49
United States v. *Heinszen & Co.*, 206 U.S. 370 (1907) 21, 48, 49

Cases—Continued: Page

United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1872) 21, 48
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 50

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 9, Cl. 7 39
Amend. V (Due Process Clause) 49
Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(A) 37, 40
Consolidated Appropriations Resolution Act, 2003, Pub. L. N. 108-7, Div. F, Tit. III, § 308, 117 Stat. 271 47
Contract Dispute Act of 1978, 41 U.S.C. 601 *et seq.* 16
Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, Tit. II, 107 Stat. 1399 ..... 11, 44
Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, Tit. II, 108 Stat. 2520 11-12
Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. II, 110 Stat. 1321-180 ..... 9, 12
Department of the Interior and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208, Tit. II, 110 Stat. 3009-205 ..... 9, 12, 43
Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543 14
Department of the Interior and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-113, § 313, 113 Stat. 1501A-192 17
Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, § 312, 114 Stat. 988 47

Statutes and regulations—Continued: Page

Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, § 310, 115 Stat. 444 47
Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, § 308, 117 Stat. 1303 47
Indian Health Amendments of 1992, Pub. L. No. 102-573, Tit. VIII, § 814, 106 Stat. 4590 5
Indian Health Care Improvement Act, 25 U.S.C. 1601 *et seq.* 8
25 U.S.C. 1601-1616p 8
25 U.S.C. 1601(d) 26
25 U.S.C. 1602(a) 8
25 U.S.C. 1621 8
25 U.S.C. 1658 40
25 U.S.C. 1661 3
25 U.S.C. 1661(a) 30
25 U.S.C. 1661(b) 30
25 U.S.C. 1661(c) 30
25 U.S.C. 1680a 9
Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (25 U.S.C. 450 *et seq.*) ..... *passim*
§ 3(b), 25 U.S.C. 450a(b) 2
§ 4(f), 25 U.S.C. 450b(f) 7, 23
§ 4(g), 25 U.S.C. 450b(g) 7
§ 4(j), 25 U.S.C. 450b(j) 4
§ 5(f), 25 U.S.C. 450c(f) 34
Tit. I (25 U.S.C. 450f *et seq.*):
§ 102, 25 U.S.C. 450f 2
§ 102(a), 25 U.S.C. 450f(a) 35
§ 102(a), 25 U.S.C. 450f(a)(1) 3, 4, 19, 28, 31
§ 102(a)(2), 25 U.S.C. 450f(a)(2) 3
§ 102(a)(2)(A)-(E), 25 U.S.C. 450f(a)(2)(A)-(E) 27
§ 102(a)(2)(D), 25 U.S.C. 450f(a)(2)(D) 27

Statutes and regulations—Continued: Page

§ 102(a)(2)(E), 25 U.S.C. 450f(a)(2)(E) 4, 19, 31
§ 102(d), 25 U.S.C. 450f(d) 25
§ 105(a), 25 U.S.C. 450j(a) 23
§ 105(i), 25 U.S.C. 450j(i) 27
§ 105(k), 25 U.S.C. 450j(k) 25
§ 106(a), 25 U.S.C. 450j-1(a) 34
§ 106(a)(1), 25 U.S.C. 450j-1(a)(1) 4, 6, 31
§ 106(a)(2), 25 U.S.C. 450j-1(a)(2) 6
§ 106(a)(3)(A), 25 U.S.C. 450j-1(a)(3)(A) 6
§ 106(a)(3)(A), 25 U.S.C. 450j-1(a)(3)(A)(ii) 7
§ 106(b), 25 U.S.C. 450j-1(b) ..... *passim*
§ 106(b)(1), 25 U.S.C. 450j-1(b)(1) 34
§ 106(b)(2), 25 U.S.C. 450j-1(b)(2) 9
§ 106(b)(3), 25 U.S.C. 450j-1(b)(3) 34
§ 106(c), 25 U.S.C. 450j-1(c) (88 Stat. 2211) 20, 40, 41, 42
§ 106(c)(2), 25 U.S.C. 450j-1(c)(2) 7
§ 106(c)(3), 25 U.S.C. 450j-1(c)(3) 7
§ 106(h), 25 U.S.C. 450j(h) (1982) (88 Stat. 2211) ... 6
§ 108(a), 25 U.S.C. 450*l*(a) 8
§ 108(c), 25 U.S.C. 450*l*(c) 5, 8, 24, 31
§ 109, 25 U.S.C. 450m 35
§ 110(a), 25 U.S.C. 450m-1(a) 15
Tit. III (25 U.S.C. 450f note (1994)) 5
§ 303(a)(6), 25 U.S.C. 450f note (1994) 5
Tit. IV (25 U.S.C. 458aa *et seq.*) 5
§ 403(k), 25 U.S.C. 458cc(k) 31, 32
§ 403(*l*), 25 U.S.C. 458cc(*l*) 5, 19
Tit. V (25 U.S.C. 458aaa *et seq.*) 5
§ 501(a)(4), 25 U.S.C. 458aaa(a)(4) 10, 32
§ 501(a)(8), 25 U.S.C. 458aaa(a)(8) 10, 32
§ 507(c)(1)(A)(ii), 25 U.S.C. 458aaa-6(c)(1)(A)(ii) ... 31
§ 508(c), 25 U.S.C. 458aaa-7(c) 5
§ 508(k), 25 U.S.C. 458aaa-7(k) 24
§ 519, 25 U.S.C. 458aaa-18 43

Statutes and regulations—Continued: Page

§ 519(b), 25 U.S.C. 458aaa-18(b) 7, 41
Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285:
§ 205, 102 Stat. 2292 (25 U.S.C. 450j-1) 7
§ 209, 102 Stat. 2296 (25 U.S.C. 450f note (1998)) 5
Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, Tit. I, § 108, 108 Stat. 4261 8
Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681:
§ 314, 112 Stat. 2681-288 ..... *passim*
§ 328, 112 Stat. 2681-291 14
Snyder Act, 25 U.S.C. 13 8
Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, Tit. II, § 204, 108 Stat. 4271 (25 U.S.C. 458aa to 458hh) 5
Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, § 4, 114 Stat. 712 (25 U.S.C. 458aaa to 458aaa-18) 5
12 U.S.C. 1715z-1(i)(1) 40
31 U.S.C. 1514(a)(1) 37
31 U.S.C. 1551 38
31 U.S.C. 1552 38
31 U.S.C. 1552(a) 47
42 U.S.C. 1395qq(c) 37
25 C.F.R.:
Section 1000.94 31
Section 1000.129(a) 32

Miscellaneous:

A Neglected Obligation, Wash. Post, Aug. 30, 2004 26
Final Report of Indian Health Service/Tribal Residual Workgroup (Feb. 1995) 29-30

Miscellaneous—Continued: Page

GAO, *Indian Self-Determination Act: Shorfalls in Indian Contract Support Costs Need to Be Addressed* (1999) 3, 7, 8, 12, 14
2 GAO, *Principles of Federal Appropriations Law* (2d ed. 1992) 24, 40, 43, 44
H.R. 1223, 100th Cong., 1st Sess. (1988) 42
H.R. Rep. No. 158, 103d Cong., 1st Sess. (1993) 11
H.R. Rep. No. 551, 103d Cong., 2d Sess. (1994) 11
H.R. Rep. No. 653, 103d Cong., 2d Sess. (1994) 32
H.R. Rep. No. 173, 104th Cong., 1st Sess. (1995) 11
H.R. Rep. No. 609, 105th Cong., 2d Sess. (1998) 36, 46
H.R. Rep. No. 837, 106th Cong., 2d Sess. (2000) 44
Indian Health Service, Department of Health and Human Services:
Indian Health Service Circular 96-04, Contract Support Costs (Apr. 1996) 13, 43
Indian Self-Determination Memorandum 92-2, Contract Support Cost Policy (Feb. 27, 1992) 12
Jennie R. Joe, *The Rationing of Healthcare and Health Disparity for the American Indians/Alaska Natives in Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* (Brian D. Smedley et al. eds., 2002) 26
OMB:
Circular No. A-11 (2004):
§ 82.8 37
§150.2 37
Circular No. A-87, 46 Fed. Reg. 9548 (1981) 7
Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. (1992):
p. 45,096 30
p. 45,103 35
S. Rep. No. 274, 100th Cong., 1st Sess. (1987) 2, 3, 35, 41, 42
S. Rep. No. 319, 104th Cong., 2d Sess. (1996) 11, 43
S. Rep. No. 227, 105th Cong., 2d Sess. (1998) 46
S. Rep. No. 221, 106th Cong., 1st Sess. (1999) 32, 36

In the Supreme Court of the United States

No. 02-1472

CHEROKEE NATION OF OKLAHOMA AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, PETITIONERS

v.

UNITED STATES OF AMERICA; TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES

No. 03-853

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND FEDERAL CIRCUITS

BRIEF FOR THE FEDERAL PARTIES

OPINIONS BELOW

The opinion of the court of appeals in No. 03-853 (Pet. App. 1a-35a) is reported at 334 F.3d 1075. The relevant opinions of the Interior Board of Contract Appeals (Board) (Pet. App. 43a-49a, 50a-73a) are not officially reported, but are available at 01-1 B.C.A. (CCH) ¶ 31,349, and 99-2 B.C.A. (CCH) ¶ 30,462.

The opinion of the court of appeals in No. 02-1472 (Pet. App. 1a-23a) is reported at 311 F.3d 1054. The opinion of the district court (Pet. App. 24a-50a) is reported at 190 F. Supp. 2d 1248. An earlier decision by the district court denying class certification is reported at 199 F.R.D. 357.

JURISDICTION

The judgment of the court of appeals in No. 02-1472 (*Cherokee*) was entered on November 26, 2002. A petition for rehearing was denied on January 22, 2003 (Pet. App. 51a-52a). The petition for a writ of certiorari was filed on April 3, 2003. The judgment of the court of appeals in No. 03-853 (*Thompson*) was entered on July 3, 2003. A petition for rehearing was denied on September 12, 2003. (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on December 11, 2003, and was granted on March 22, 2004. The petition in No. 02-1472 was granted the same day, and the cases were consolidated. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, and the applicable appropriations acts are reproduced at *Thompson* Pet. App. 81a-115a.

STATEMENT

I. Statutory Background

Congress enacted the Indian Self-Determination and Education Assistance Act (ISDA), Pub. L. No. 93-638, 88 Stat. 2203, in 1975 to promote "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal programs and services for Indians. 25 U.S.C. 450a(b). Until that time, federal programs and services for Indians were primarily administered directly by the federal government. See S. Rep. No. 274, 100th Cong., 1st Sess. 2-3 (1987). Under the ISDA, Indian Tribes may elect to enter into "self-determination contracts" with the Secretary of the Interior and the Secretary of Health and Human Services to assume operation of services for Indians otherwise administered directly by those Departments. 25 U.S.C. 450f. By 1998, about half of the Departments' combined appropriations for Indian programs was administered by Tribes pursuant to self-determination contracts. GAO, *Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed* (*GAO Report*) 5 (1999).

The Secretary of each Department has delegated authority to enter into self-determination contracts to the agency within the Department responsible for administration of Indian programs: the Bureau of Indian Affairs (BIA) in the Department of the Interior, and the Indian Health Service (IHS), an agency within the Public Health Service in the Department of Health and Human Services. The contracts at issue in this case are with the Secretary of Health and Human Services (the Secretary) through IHS. IHS is responsible for delivering primary health care services to federally recognized Tribes and their members. 25 U.S.C. 1661.

A. General Provisions Of The ISDA

1. The ISDA directs the Secretary, "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract" to "plan, conduct, and administer programs or portions thereof." 25 U.S.C. 450f(a)(1). "Self-determination contracts with Indian tribes are not discretionary. The Act contains only limited reasons for declination to contract by [the] Secretary." S. Rep. No. 274, *supra*, at 3. In particular, the Secretary is required to approve a tribe's proposed self-determination contract within 90 days unless the Secretary issues a written finding "clearly demonstrat[ing]" that the proposal is deficient according to certain specified declination criteria. 25 U.S.C. 450f(a)(2). As a result, the Act "uniquely requires the Secretary * * * to continue providing direct services until such time as a tribe freely chooses to contract to operate those services." S. Rep. No. 274, *supra*, at 6.

The ISDA authorizes Tribes to assume not only the direct delivery of services but also "administrative functions * * *

that support the delivery of services." 25 U.S.C. 450f(a)(1). Those "administrative functions * * * shall be contractable without regard to the organizational level within the Department that carries out those functions." *Ibid.*; see 25 U.S.C. 450j-1(a)(1). At the same time, the ISDA makes clear that certain agency responsibilities are "beyond the scope of programs, functions, services, or activities" that are contractable, "because [they] include[] activities" that must be conducted by the agency and "cannot lawfully be carried out by the contractor." 25 U.S.C. 450f(a)(2)(E); see 25 U.S.C. 450f(a)(1) (providing for assumption by contracting Tribe of "administrative functions * * * that are *otherwise contractable*") (emphasis added); 25 U.S.C. 450j-1(a)(1) (allowing for funding of "administrative functions that are *otherwise contractable*") (emphasis added).

2. The ISDA thus effectively entitles a tribe to step into the shoes of a federal agency in receiving federal funds and administering government services. The statute recognizes that the unique, government-to-government nature of self-determination contracts differs from standard government procurement contracts. See 25 U.S.C. 450b(j) ("no [self-determination] contract * * * shall be construed to be a procurement contract"); S. Rep. No. 274, *supra*, at 18 ("The term 'self-determination contract' means an intergovernmental contract that is not a procurement contract. This definition recognizes the unique nature of self-determination contracts between the Federal government and Indian tribal governments.").

Unlike a typical procurement contractor, a Tribe that elects to enter into a self-determination contract under the ISDA does not commit to supply a specific level of services in exchange for an agreed-upon payment. Instead, the tribe, like the federal agency before it, undertakes to deliver federal services within the limits of funds awarded to it and has no obligation to "continue performance that requires an expenditure of funds in excess of the amount of funds awarded." 25 U.S.C. 450*l*(c) (Model agreement § 1(b)(5)); see, *e.g.*, J.A. 79. In recognition of the distinctive manner in which contracting Tribes assume the delivery of government services, the ISDA deems employees of contracting Tribes to be part of the Department of Health and Human Services for purposes of the Federal Tort Claims Act while carrying out the services. See 25 U.S.C. 450f(d).

3. In 1988, Congress added a "Tribal Self-Governance Demonstration Project" to the ISDA, enabling participating Tribes to step further into the shoes of a federal agency. Pub. L. No. 100-472, § 209, 102 Stat. 2296 (25 U.S.C. 450f note (1994)) (adding ISDA Tit. III). The project authorized a limited number of Tribes, each of which had performed multiple self-determination contracts for three fiscal years, to enter into an overarching self-governance "compact," under which the Tribe could redesign its contracted programs and reallocate funding among programs. Although the self-governance project initially applied only to BIA, Congress extended the project to IHS in 1992. Pub. L. No. 102-573, Tit. VIII, § 814, 106 Stat. 4590. Subsequently, Congress repealed the demonstration project and permanently codified self-governance provisions for BIA (in 1994) and IHS (in 2000) as Titles IV and V of the ISDA, respectively. Pub. L. No. 103-413, Tit. II, § 204, 108 Stat. 4271 (1994) (codified as amended at 25 U.S.C. 458aa to 458hh); Pub. L. No. 106-260, § 4, 114 Stat. 712 (2000) (codified at 25 U.S.C. 458aaa to 458aaa-18).

Funding under self-governance compacts is provided through annual funding agreements subject to the same funding provisions that apply to self-determination contracts. See 25 U.S.C. 458aaa-7(c) (permanent IHS self-governance provisions); 25 U.S.C. 458cc(*l*) (permanent BIA self-governance provisions); Pub. L. No. 100-472, § 209, 102 Stat. 2296 (adding ISDA § 303(a)(6) (self-governance demonstra-

tion project)). Accordingly, while this case involves self-governance compacts, the funding provisions for self-determination contracts control. See *Thompson* Pet. App. 7a; *Cherokee* Pet. App. 2a n.1.

B. Funding Of Self-Determination Contracts Under The ISDA

With respect to the amount of funds provided to a Tribe that elects to assume operation of a federal program, the ISDA, as originally enacted, provided for transferring the amount that the Secretary would have allocated to the program if he were still administering it directly. 25 U.S.C. 450j-1(a)(1) ("amount of funds provided * * * shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs"); see Pub. L. No. 93-638, § 106(h), 88 Stat. 2211. That base amount of funding is sometimes referred to as the "secretarial amount." See, *e.g.*, *Thompson* Pet. App. 4a.

1. a. In 1988, Congress amended the ISDA and directed the Secretary to add to the secretarial amount an amount for "contract support costs" (CSCs). 25 U.S.C. 450j-1(a)(2). CSCs are costs that a Tribe incurs in operating a program but that the Secretary would not incur if he were directly administering the program. 25 U.S.C. 450j-1(a)(2). By definition, therefore, funding for CSCs is over and above what the Secretary would require to operate the same program directly. Such costs would include certain employment taxes and expenses to which the federal government is not subject, and costs that non-federal entities must incur when contracting with the federal government to ensure compliance and accountability.

CSCs can include both direct costs and indirect costs. 25 U.S.C. 450j-1(a)(3)(A). Direct CSCs may include, for example, initial startup expenses, unemployment taxes, and workers compensation payments. See J.A. 12-13. Indirect CSCs comprise an allocable share of general overhead

expenses incurred by a Tribe across its various activities and programs (*i.e.*, for facilities, equipment, and financial and personnel management), except insofar as such expenses are already accounted for in funds for ordinary administrative activities that are transferred to the Tribe as part of the secretarial amount. 25 U.S.C. 450j-1(a)(3)(A)(ii); see J.A. 13-14. Indirect CSCs make up the majority of CSCs, see *GAO Report* 6, and are generally calculated by applying an "indirect cost rate" to the amount of funds otherwise payable to the Tribe, see 25 U.S.C. 450b(f) and (g), 450j-1(c)(3); *Thompson* Pet. App. 7a-8a; see also OMB, Circular No. A-87, 46 Fed. Reg. 9548 (1981).

b. At the same time that it provided for funding of CSCs in the 1988 amendments, Congress also prescribed an overarching limitation on the Secretary's obligation to provide funds to a tribe under a self-determination contract. Pub. L. No. 100-472, § 205, 101 Stat. 2293 (codified as amended at 25 U.S.C. 450j-1(b)). That provision states:

> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

25 U.S.C. 450j-1(b); 25 U.S.C. 458aaa-18(b) (same) (enacted as part of IHS self-governance provisions in 2000). In addition, Congress, anticipating that appropriations may be insufficient for for full funding of CSCs for all Tribes, directed the Secretary to submit an annual report setting out, *inter alia*, "an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year." 25 U.S.C. 450j-1(c)(2); see Pub. L. No. 100-472, § 205, 102 Stat. 2293.

2. Congress added a "model agreement" to the ISDA in 1994, the terms of which must be contained or incorporated

in "[e]ach self-determination contract." 25 U.S.C. 450*l*(a); see Pub. L. No. 103-413, § 108, 108 Stat. 4261. The model agreement provision addressing funding amounts states that: "*Subject to the availability of appropriations*, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement." 25 U.S.C. 450*l*(c) (Model agreement § 1(b)(4)) (emphasis added).

II. The Indian Health Service's Appropriations And Funding

IHS provides health care services for over 1.6 million American Indians and Alaska Natives, who belong to more than 500 Indian Tribes. IHS services are delivered through approximately 150 local "service units" encompassing some 500 direct health care facilities, including 49 hospitals, 195 health centers, eight school health centers, and 289 health stations, satellite clinics and Alaska village clinics. J.A. 219 ¶ 20. As of 1998, approximately 45% of IHS's funding for programs was administered by Tribes through self-determination contracts. *GAO Report* 37.

A. IHS's Allocation Of Appropriations Generally

IHS allocates and spends its appropriated funds principally under the authority of the Snyder Act, 25 U.S.C. 13, and the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1601 *et seq.*[1] Congress appropriates funds for IHS health care programs through an annual lump-sum appropriation for "Indian Health Services." See, *e.g.*, Department

[1] The Snyder Act authorizes IHS to "direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States * * * [f]or relief of distress and conservation of health." 25 U.S.C. 13. The IHCIA, which is intended to "assure the highest possible health status for Indians," 25 U.S.C. 1602(a), authorizes appropriations in a number of health-related areas and establishes several health programs. See 25 U.S.C. 1621; see generally 25 U.S.C. 1601-1616p.

of the Interior and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208, Tit. II, 110 Stat. 3009-205, 3009-212.[2] In the relevant fiscal years, IHS's lump-sum appropriation for Indian Health Services ranged from $1.65 billion (1994) to $1.81 billion (1997). J.A. 213 ¶ 3, 384 ¶ 4.

The agency allocates a small share of the lump-sum appropriation to its Headquarters Office, with the remaining funds allocated to twelve Area Offices responsible for administering programs within a defined geographic region. J.A. 385 ¶ 8, 386 ¶ 10. Each Area Office in turn apportions its share of funds among local service unit programs in its area, with some funds assigned to programs directly operated by the agency on behalf of non-contracting Tribes and other funds assigned to programs administered by Tribes through self-determination contracts. J.A. 215-216 ¶ 10; J.A. 385-386 ¶ 8. Programs ordinarily are funded on a recurring annual basis, with both contracted and non-contracted programs generally allocated the same amount of funding as in the previous fiscal year, plus a proportionate share of any overall increases in program funding. J.A. 215-216 ¶ 10; J.A. 385-386 ¶ 8; see 25 U.S.C. 450j-1(b)(2) (prohibiting reduction in contract funding in subsequent years except pursuant to, *inter alia*, reduction in appropriations for the program); 25 U.S.C. 1680a (requiring IHS to provide funds to contracting Tribes for "cost-of-living increases" and "other expenses relating to the provision of health services" on "the same basis as such funds are provided to programs and services operated directly").

The Headquarters Office and the Area Offices retain some funds to pay for administrative support for programs. J.A.

[2] IHS also receives a separate lump-sum appropriation for "Indian Health Facilities," which provides funds for construction and maintenance of health care and sanitation facilities. See, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. II, 110 Stat. 1321-190. Those funds are not at issue in this case.

385-386 ¶¶ 8, 10. Those administrative funds fall into two categories. First, a portion of the funds, referred to as "residual" funds, pays for inherent federal functions that are not available for contracting because they must be carried out by the agency—*i.e.*, those funds necessary for IHS to conduct its essential functions as a federal agency even if all IHS health service programs were administered by Tribes under self-determination contracts. J.A. 217 ¶ 14, 385-386 ¶¶ 8, 10; see 25 U.S.C. 458aaa(a)(4) ("The term 'inherent Federal functions' means those Federal functions which cannot legally be delegated to Indian tribes."). The remaining funds for administrative support are available for contracting by Tribes, with each Tribe assigned a "tribal share" of such funds. J.A. 218 ¶ 15, 385-386 ¶ 8; see 25 U.S.C. 458aaa(a)(8) ("'tribal share' means an Indian tribe's portion of all funds * * * that support secretarial programs" and "are not required * * * for performance of inherent Federal functions"). Whereas the tribal share of a contracting Tribe is distributed to the Tribe, the tribal share of a non-contracting Tribe is retained by the agency to fund administrative support for direct delivery of services to that Tribe's members by IHS. J.A. 218 ¶ 15.

The upshot of the IHS's allocation of funds is that, with the exception of residual funds retained by the agency to pay for inherent federal functions, the entire Indian Health Services appropriation is available for contracting by Tribes. In the relevant fiscal years, the agency allocated roughly 1.5% to 2.0% of the Indian Health Services appropriation to inherent federal functions, leaving all remaining sums available for contracting by Tribes. See J.A. 384 ¶ 4 (total appropriations); J.A. 525 (FY 1994 residual); J.A. 542 (FY 1995 residual); J.A. 562 (FY 1996 residual).

B. IHS's Funding For Contract Support Costs

1. In each of the relevant fiscal years, the Appropriations Committees in Congress identified a specific amount of the

Indian Health Service appropriation that was expected to be allocated to CSCs. The committee reports allocate the lump-sum appropriation among 14 discrete categories, one of which is "Contract Support Costs." J.A. 214 ¶ 4, 384 ¶ 5.[3] Those same categories are used throughout IHS's budget and appropriations process: the agency apportions its funding among those categories in its annual Justification of Appropriations; the President allocates IHS's budget among the same categories when submitting the annual federal budget to Congress; and the Appropriations Committees earmark amounts in their reports for each category. J.A. 384-385 ¶ 6. The committee reports for the relevant fiscal years earmarked between $136.7 million (FY 1994) and $160.7 million (FY 1997) for the category of "Contract Support Costs."[4]

In addition, Congress specified in each year's appropriations act that $7.5 million was to pay for CSCs associated with new or expanded contracts. In particular, the appropriation for Indian Health Services provided in each year that, "of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination [ISD] Fund, which shall be available for the transitional costs of initial or expanded tribal [self-determination] contracts."[5]

---

[3] The remaining categories are: Hospitals and Clinics, Mental Health, Alcohol and Substance Abuse, Public Health Nursing, Health Education, Communication Health Representatives, Immunization, Urban Health, Indian Health Professions, Tribal Management, Direct Operations, and Self-Governance. J.A. 384 ¶ 5.

[4] See H.R. Rep. No. 158, 103d Cong., 1st Sess. 100, 104 (1993) ($136,686,000 for FY 1994); H.R. Rep. No. 551, 103d Cong., 2d Sess. 103 (1994) ($145,738,000 for FY 1995); H.R. Rep. No. 173, 104th Cong., 1st Sess. 97 (1995) ($153,040,000 for FY 1996); S. Rep. No. 319, 104th Cong., 2d Sess. 90 (1996) ($160,660,000 for FY 1997).

[5] Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, Tit. II, 107 Stat. 1408; Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-

The ISD Fund referred to in the appropriations acts was established by IHS in 1988 to pay for CSCs associated with new or expanded programs. See *GAO Report* 82.[6]

2. In each of the relevant fiscal years, IHS in turn funded CSCs in an amount equaling the full amount earmarked in the committee reports, with the $7.5 million appropriation for the ISD Fund allocated to pay CSCs for new or expanded programs and the remaining sums allocated to contracts for ongoing programs. J.A. 218-219 ¶ 17, 302 ¶ 24. While the agency distributed all of those funds to Tribes, the amounts were insufficient to permit full funding of CSCs. See generally *GAO Report* 82. In 1995 and 1996, for example, requests for CSCs for new or expanded contracts exceeded the $7.5 million ISD Fund appropriation by $21.9 million and $34.6 million, respectively. J.A. 393 ¶ 42. And in 1996 and 1997, the overall shortfall in CSC funding, including both new or expanded contracts and ongoing contracts, was approximately $43 million and $82 million, respectively. J.A. 53, 215 ¶ 8.

IHS allocated its CSC funds in those years in accordance with guidelines that had been established in 1992, in consultation with Tribes, in anticipation of funding shortfalls for CSCs. Indian Self-Determination Memorandum 92-2, Contract Support Cost Policy (Feb. 27, 1992) (J.A. 6-19); see J.A. 220-221 ¶¶ 23-24. Those guidelines, consistent with the general limitation on the Secretary's obligation to provide funding in 25 U.S.C. 450j-1(b), stated that funding "for contract support costs [was] subject to the availability of funds made available for this purpose." J.A. 7.

332, Tit. II, 108 Stat. 2499, 2528; Department of the Interior and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-134, Tit. II, 110 Stat. 1321-189; Department of the Interior and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208, Tit. II, 110 Stat. 3009-212, 3009-213.

[6] BIA created a parallel ISD Fund in 1995. See *GAO Report* 80.

With respect to new or expanded contracts, the agency placed CSC requests in a queue based on the date of the request (the ISD queue), and awarded full-funding of those CSCs on a first-come, first-served basis each year until the $7.5 million appropriation for the ISD Fund was exhausted. J.A. 10-11, 220 ¶ 23. Unfunded requests remained on the queue in subsequent years. Once a tribe's request reached the top of the queue and was funded, the funds became part of the Tribe's recurring CSC funding base in subsequent years. J.A. 220 ¶ 23. With respect to ongoing contracts, tribes received the same amount of CSC funding as in the previous year plus a proportionate share of any general increase in overall CSC funding. J.A. 15. In 1996, after consultation with Tribes, IHS revised the guidelines but did not alter the basic distribution methodology. Indian Health Service Circular 96-04, Contract Support Costs (April 1, 1996) (J.A. 20-37).

3. In the appropriations act for fiscal year 1999, Congress enacted a provision barring IHS from spending any amounts on CSCs for fiscal years 1994 to 1998 above the sums that had been earmarked in appropriations laws or appropriations committee reports for those years. That provision directs:

> Notwithstanding any other provision of law, the amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service * * * for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts * * * are the total amounts available for fiscal years 1994 through 1998 for such purposes * * * .

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-227, § 314, 112 Stat.

2681-288 (Section 314).[7] Since the appropriations act for fiscal year 1998, moreover, Congress has imposed an explicit, "not to exceed" cap funding by IHS for overall CSCs. See, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1583; see *Thompson* Pet. 5 n.3 (citing subsequent appropriations acts).[8]

III. The Current Controversy

A. Factual Background

The Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes of the Duck Valley Reservation (collectively, the Tribes) entered into self-governance compacts with IHS in 1993 and 1994, respectively. J.A. 72-103 (Shoshone-Paiute); J.A. 172-200 (Cherokee Nation). Those compacts and the associated annual funding agreements (AFAs) provide, consistent with 25 U.S.C. 450j-1(b) and the ISDA model agreement, that the provision of funds is subject to the availability of appropriations. See J.A. 78, 127, 145, 176, 239. The AFAs also specifically contemplate adjustments in funding based on "Congressional action in appropriation Acts or other laws affecting availability of funds." J.A. 121-122; see J.A. 190, 237, 239, 256-257, 269.

B. Proceedings Below

These consolidated cases concern the provision of CSC funds to the Cherokee Nation in fiscal years 1994 to 1997 and to the Shoshone-Paiute in fiscal years 1996 and 1997. In particular, *Cherokee* (No. 02-1472) involves claims by the

[7] In the same year, Congress enacted a one-year moratorium barring the Secretary from entering into new ISDA contracts. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 328, 112 Stat. 2681-291.

[8] A parallel cap on CSC funding had been in BIA's appropriation since 1994. *GAO Report* 80.

Shoshone-Paiute for 1996 and 1997 and by the Cherokee Nation for 1997, and *Thompson* (No. 03-853) involves claims by the Cherokee Nation for 1994 to 1996. Both Tribes contracted in those years to undertake new or expanded programs for which they did not receive CSC funding because IHS used the $7.5 million ISD Fund appropriation to fund requests ahead of the Tribes' in the ISD queue. Also, the Cherokee Nation raises claims concerning CSC funding for ongoing contracts.[9]

1. Proceedings in Cherokee Nation, *No. 02-1472*

a. On March 5, 1999, the Tribes brought an action in the United States District Court for the Eastern District of Oklahoma, claiming an entitlement to full CSC funding under the ISDA and their contracts. See 25 U.S.C. 450m-1(a). The district court granted summary judgment in favor of the government. Pet. App. 24a-50a. The court held that IHS had insufficient appropriations available in the relevant fiscal years to permit full funding of CSCs, and that reprogramming funds to pay for CSCs would have resulted in a reduction of services to other tribes within the meaning of 25 U.S.C. 450j-1(b). Pet. App. 46a.

b. The Tenth Circuit affirmed. Pet. App. 1a-23a. The court rejected the Tribes' argument that they had a vested entitlement to full CSC funding immediately upon enactment of the annual lump-sum appropriation for Indian Health Services. *Id.* at 15a-16a. The court instead held that, under 25 U.S.C. 450j-1(b), the Secretary was not required to provide full funding because doing so "would have necessitated a reduction in funding for other tribal programs." Pet. App. 15a.

The court further explained that IHS could adhere to the level of CSC funding earmarked in the committee reports

[9] The Cherokee Nation's claims for ongoing contracts are limited to 1995 and 1997 because it received full CSC funding for ongoing contracts in 1994 and 1996. See *Thompson* Pet. App. 79a-80a.

"as an exercise of the limited discretion inevitably vested in it" in allocating funds within its overall budget. Pet. App. 16a. With respect to the $7.5 million appropriation for the ISD Fund, the court agreed with the Ninth Circuit that Congress thereby "limit[ed] the amount available for new or expended CSCs." *Id.* at 20a (citing *Shoshone-Bannock Tribes* v. *Thompson*, 279 F.3d 660 (9th Cir. 2002)). Finally, the court explained that its conclusions were reinforced by Section 314 of the 1999 appropriations act (see p. 13, *supra*), which had established that "no more funds would be available to pay CSCs" for fiscal years 1994-1998 above the $7.5 million appropriation for CSCs for new or expanded programs and the total budget for CSCs earmarked in the Committee Reports. Pet. App. 21a.

2. Proceedings in* Thompson, *No. 03-853

a. On September 27, 1996, the Cherokee Nation submitted a claim to IHS under the Contract Disputes Act, 41 U.S.C. 601 *et seq.*, alleging underpayment of CSCs in fiscal years 1994 to 1996. The contracting officer denied the claim, ruling that Congress had not provided IHS sufficient funds for CSCs and that "IHS is not required to meet [the Cherokee Nation's] total need for indirect costs where such action would reduce the funds otherwise available to other tribes." Pet. App. 76a-77a.

b. On appeal, the Interior Board of Contract Appeals (IBCA) granted summary judgment in favor of the Cherokee Nation. Pet. App. 50a-73a. The IBCA held that, although contract funding was subject to the availability of appropriations, the overall lump-sum appropriation for Indian Health Services was sufficient to fund CSCs for the Cherokee Nation. *Id.* at 67a-68a. The IBCA also ruled that Section 314 of the 1999 appropriations act did not "extinguish" the Cherokee Nation's entitlement to full funding of CSCs. *Id.* at 69a-71a. Finally, on reconsideration, the IBCA rejected the Secretary's reliance on Section 450j-1(b)'s condition that

he was not required to reduce funding for programs serving a Tribe to make funds available to another Tribe. *Id.* at 43a-49a. In the IBCA's view, the Secretary was obligated to pay CSC's "first" from the lump-sum appropriation and he thus lacked authority to withhold CSC funding to pay for various health-service programs, many of which the IBCA believed to be "discretionary." *Id.* at 48a.

c. The Federal Circuit affirmed. Pet. App. 1a-35a. With respect to ongoing contracts, the court held that the Secretary had a duty to pay full CSCs and that there were "available funds" within the annual lump-sum appropriation. *Id.* at 20a-22a. With respect to new or expanded contracts, the court disagreed with the Ninth and Tenth Circuits and held that the $7.5 million appropriation specified for the ISD Fund was not a ceiling. *Id.* at 22a-26a. The court also rejected the Secretary's reliance on Section 314, interpreting that provision as "merely prohibiting the *future* obligation of unspent appropriated funds" left over for fiscal years 1994 through 1998, not to limit the amounts the Secretary could pay *during* those fiscal years. *Id.* at 29a.

Next, the court held that the Secretary's obligation to pay full CSCs was not relieved by Section 450j-1(b)'s prescription that funding for programs serving a Tribe need not be reduced to make funds available to another Tribe. Pet. App. 31a-34a. In the court's view, there were "substantial funds" that the Secretary could have used to pay additional CSCs to the Cherokee Nation without reducing funding for programs serving other Tribes. *Id.* at 31a. The court pointed in particular to the residual funds retained by IHS for inherent federal functions, *i.e.*, funds necessary for IHS to exist as a federal agency at all. The court reasoned that those funds were not for programs serving another Tribe and so could be reprogrammed to pay CSCs. *Id.* at 32a-33a. In addition, the court believed that the Secretary should have used IHS's unobligated year-end balances of between $1.2 million and

$6.8 million to pay the Cherokee Nation full CSCs. Pet. App. 33a.

SUMMARY OF ARGUMENT

I. The ISDA prescribes that, "[n]otwithstanding any other provision," the "provision of funds under [the Act] is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe." 25 U.S.C. 450j-1(b). That provision recognizes that IHS must apportion scarce resources for Indian health services programs among numerous competing demands by or on behalf of Tribes, and that the ISDA does not give any single Tribe an entitlement to full funding at the expense of the needs of all other Tribes.

A. There is no merit to the Tribes' argument that each individual Tribe gained an automatic entitlement to full funding of its CSCs because the amount of the lump sum appropriation in a given fiscal year was sufficient to pay any one Tribe's CSCs. That approach treats each Tribe's claim to ISDA funds as entirely unaffected by the needs of other Tribes, which is inconsistent with the distinctive, government-to-government nature of ISDA contracts.

In the setting of a standard procurement contract, it may be that in certain circumstances a contractor is not charged with knowledge of competing demands on the funds or of an agency's discretionary decision to allocate funds elsewhere. The ISDA makes clear, however, that self-determination contracts are not procurement contracts. Whereas a procurement contractor supplies services *to* the government, a Tribe assumes the delivery of services *as* the government. Like an agency, the Tribe is allocated a portion of the total funds made available by Congress, and the Tribe has no obligation to deliver a specific quantity of services or to continue services in excess of the amount of funds received. Each Tribe is fully aware that IHS must allocate limited

funding among numerous local programs, and that its own ISDA contract therefore is not an independent federal procurement but rather the product of the necessary allocation of funds among Tribes.

B. The ISDA embodies that understanding in its "reduction clause," which provides that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe." 25 U.S.C. 450j-1(b). IHS allocates its entire lump sum appropriation among three general categories of funding: (i) direct delivery of services; (ii) administrative support functions that Tribes may contract to assume; and (iii) inherent federal functions that must be performed by the agency itself.

Contrary to the view of the Tribes and of the Federal Circuit below, the Secretary was not required to reprogram funds for the agency's inherent federal functions to pay for the Tribes' CSCs. A basic principle of government contracting is that certain agency functions must be performed by the agency and thus are not subject to contracting. The ISDA makes clear that the agency was not required to reprogram those funds—and potentially contract itself out of existence—to pay the full CSCs of contracting Tribes. For instance, the ISDA only allows for assumption by Tribes of administrative functions "that are otherwise contractable," 25 U.S.C. 450f(a)(1), and specifically assumes that certain functions "cannot lawfully be carried out by the contractor," 25 U.S.C. 450f(a)(2)(E). And when Congress codified the permanent self-governance provisions in the ISDA, it made explicit that the Secretary may not contract "with respect to functions that are inherently Federal." 25 U.S.C. 458cc(k). The Tribes' agreements in this case accept that basic understanding.

C. The Secretary's funding determinations with respect to CSCs were also supported by the ISDA's "availability" clause, which states that "the provision of funds" is "subject

to the availability of appropriations." 25 U.S.C. 450j-1(b). Contrary to the Tribes' position, appropriations are not automatically "available" to pay a Tribe's full CSCs simply because the total amount of the lump sum appropriation exceeds that individual Tribe's CSCs. The availability of funds for any one Tribe must be considered, not in isolation, but in the context of the need to allocate funds among numerous tribal programs for the delivery of health care services to Tribes and their members.

The terms of the availability clause reflect that understanding. The clause refers specifically to the "provision of funds" by the Secretary, and it is a grant of authority to adjust the level of funding for a contract in response to the amount of appropriations. Accordingly, the fact that each Tribe's CSCs were less than the overall lump sum was not itself sufficient to render appropriations "available" to pay full CSCs. The legislative history confirms that Congress added the availability clause to the ISDA in order to ensure that the Secretary was not required to pay for CSCs ahead of all competing priorities. Congress also made clear its intention in that respect by requiring the Secretary to submit an annual report identifying the shortfall in CSC funds, 25 U.S.C. 450j-1(c), a requirement that would have been unnecessary if Congress had intended for the Secretary to pay full CSCs from the lump sum appropriation ahead of any other demands.

II. Section 314 of the 1999 appropriations act independently establishes that the Secretary was not required to distribute additional CSC funds in the relevant fiscal years. That provision states that, "[n]otwithstanding any other provision of law," the "amounts appropriated to or earmarked in committee reports" for "contract support costs" are the "total amounts available for fiscal years 1994 through 1998 for such purposes." 112 Stat. 2681-288. Because the Secretary, in each of those years, distributed CSC funds in

amounts equaling the amounts "earmarked in committee reports," Section 314 establishes that the amounts distributed by the Secretary are the "total amounts available" for those years. Section 314 thus confirms that the Secretary was not required to make additional CSC funding available in those years.

The Tribes interpret Section 314 as intended solely to prohibit the expenditure of any leftover balances from fiscal years 1994 to 1998 to pay for CSCs for those years. But Congress made no reference to leftover balances in the text and gave no suggestion that Section 314 was to have that restricted effect. Moreover, even though the authority to use leftover balances expires after five years, Congress has reenacted the provisions of Section 314 in each subsequent year and has continued to apply the provisions to fiscal years beginning with 1994. If Congress's sole intention were to limit the authority spend leftover balances, there would have been no need to apply the provisions of Section 314 to fiscal years for which the five-year period has elapsed.

There is no merit to the Tribe's argument that according Section 314 its plain meaning would raise serious constitutional concerns. Section 314 could raise no issue under *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), because it changed pre-existing law by clarifying the total amounts available for CSCs in the specified years. Congress clearly has the power to enact legislation that affects the disposition of pending cases. Section 314 is in the nature of a retroactive ratification by Congress of agency action. This Court has upheld such ratifications by Congress and has further held that they apply in pending cases. *E.g.*, *United States* v. *Heinszen & Co.*, 206 U.S. 370 (1907). Here, even if the Secretary initially erred in funding CSCs at the levels earmarked in the committee reports, Congress in Section 314 subsequently ratified the Secretary's actions.

ARGUMENT

I. THE SECRETARY WAS NOT REQUIRED BY THE INDIAN SELF-DETERMINATION ACT TO PAY THE TRIBES' FULL CONTRACT SUPPORT COSTS AHEAD OF ALL COMPETING PRIORITIES AND AT THE EXPENSE OF PROGRAMS SERVING OTHER TRIBES

Congress specified in the terms of the ISDA that, "[n]otwithstanding any other provision in [the ISDA],"

> the provision of funds under [the ISDA] is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under [the ISDA].

25 U.S.C. 450j-1(b). That provision, by its terms, governs over "any other provision" in the ISDA, and it establishes that the Secretary was not obligated to pay the Tribes' full CSCs.

The Tribes divide the critical sentence in Section 450j-1(b) into two distinct clauses, "availability" and "reduction," and urge an unduly cramped construction of each. The threshold flaw in that approach is that it considers each clause in a vacuum. The clauses were enacted together, and they are mutually reinforcing as parts of the same sentence and in the context of the ISDA as a whole. Together, they embody a recognition by Congress that the agency is charged with apportioning scarce resources for Indian programs among competing demands by or on behalf of numerous Tribes, and that the ISDA was not designed to prevent the agency from fulfilling that traditional and critical function.

A. Tribal Contractors Step Into The Shoes Of A Federal Agency Under The ISDA And Therefore Are Subject To The Same Funding Constraints

The core of the Tribes' argument (Br. 25-32) is that enactment of a general lump sum appropriation automatically rendered sufficient funds available to pay each individual Tribe's full CSCs, and that the Tribes in this case, upon enactment of each year's lump sum appropriation, gained an immediate entitlement to payment of those CSCs ahead of all competing demands on the funds. That is so, in the Tribes' view, even though the competing demands are by or on behalf of *other* Tribes that would have comparable claims to the same appropriation. This divide-and-conquer approach ignores the Secretary's fundamental obligation to ensure that the total amount of funds allocated to individual Tribes, together with the funds necessary to support IHS's inherent federal functions, do not exceed the annual lump sum appropriation. It also ignores the necessary consequences in this setting of the unique, government- to-government nature of agreements under the ISDA.

1. The ISDA manifests throughout that Tribes electing to assume administration of federal services become partners in administering a federal program, not standard arms-length procurement contractors. See 25 U.S.C. 450b(f) (stating that "no [self-determination] contract * * * shall be construed to be a procurement contract"); 25 U.S.C. 450j(a) (exempting self-determination contracts from federal contracting laws and regulations). The Tribes are therefore wrong to rely (Br. 25-32) on decisions holding in the procurement context that, if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds. See *Blackhawk Heating & Plumbing Co.* v. *United States*, 622 F.2d 539, 552 n.9 (Ct. Cl. 1980);

2 GAO, *Principles of Federal Appropriations Law* (*GAO Redbook*) 6-17 to 6-18 (2d ed. 1992). A procurement contract generally is the product of arms-length bargaining on the quantity of services to be supplied and the price to be paid. The risk of over-obligation may be found to fall on the agency in that setting because the agency has discretionary control over its funds; and the contractor is not charged with knowledge of a discretionary decision by the agency to allocate the funds elsewhere. See *id.* at 6-17.

Whatever force that approach may have in the context of an arms-length agreement between a procurement contractor and an agency, it is inapposite when a Tribe essentially elects to *become* an agency pursuant to the ISDA. Unlike procurement contractors, each Tribe enjoys a unilateral entitlement under the ISDA to assume administration of federal services for its members. A Tribe does not thereby undertake to supply a fixed quantity of services in exchange for a negotiated price. Instead, a Tribe, just like a federal agency, is allocated its portion of the total amount of funds made available by Congress, and the Tribe is under no obligation to deliver services "in excess of the amount of funds awarded." 25 U.S.C. 450*l*(c) (Model agreement § 1(b)(5)); see 25 U.S.C. 458aaa-7(k). The Tribes in this case received payments of recurring annual funds to administer federal programs within their respective service areas, see J.A. 78-79, 176-177, and they understood that they had no obligation to provide services in excess of the amount of funds received, see J.A. 79-80.

Significantly, moreover, under the ISDA, the condition that the provision of funds is subject to availability of appropriations is not simply a provision in a contract. Compare *Blackhawk*, 622 F.2d at 542. That limitation is set forth in the Act itself. It therefore establishes an overriding statutory condition on funding for IHS's programs to which all

Tribes are mutually subject, and which in turn is reflected in their agreements with IHS.

Once the lump sum appropriation for a given fiscal year is enacted, the overall IHS budget is allocated among numerous local service units to support the delivery of health care services for all Tribes whose members are beneficiaries of IHS programs. Just as all Tribes are fully aware of the overriding statutory limitation that funding is subject to the availability of appropriations, all Tribes also are fully aware that there is a threshold allocation of funds, and that they all are, in this respect, similarly situated. Each Tribe therefore is fairly charged with knowing that its own ISDA contract is not an independent procurement for a distant federal agency, but rather the product of the overall allocation mechanism among Tribes.

The ISDA reinforces in additional ways the degree to which a self-determination Tribe steps into the shoes of a federal agency in the Tribe's own service area. For instance, the Act deems participating Tribes to be part of the Department of Health and Human Services for purposes of the Federal Tort Claims Act. See 25 U.S.C. 450f(d). Tribes also are deemed to be "an executive agency and part of the Indian Health Service" for purposes of gaining access to federal sources of supply. 25 U.S.C. 450j(k). In short, whereas a procurement contractor supplies services *to* the government, a Tribe provides services *as* the government.

2. The foregoing understanding of ISDA contracts substantially informs the statutory condition that "the provision of funds * * * is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects or activities serving a tribe to make funds available to another tribe." 25 U.S.C. 450j-1(b). That provision reflects, consistent with the overall thrust of the ISDA, that a contracting Tribe steps into the shoes of the federal agency in the Tribe's service area and thus is subject

to the same funding constraints that the agency would confront if it continued to administer the program directly at that location.

That is particularly the case in view of the acute funding constraints on IHS programs. See *A Neglected Obligation*, Wash. Post, Aug. 30, 2004, at A22 ("The Indian Health Service, primary health care provider for more than 1.6 million members of federally recognized tribes, is so underfunded that it spends only $1,914 per patient per year, about half of what the government spends on prisoners ($3,803) and far below what is spent on the average American ($5,065)."). Congress recognized that the "unmet health needs of the American Indian people are severe and the health status of the Indians is far below that of the general population of the United States." 25 U.S.C. 1601(d). IHS's annual appropriation falls far short of the funds necessary to address the health care needs of Indian tribes and their members. See Jennie R. Joe, *The Rationing of Healthcare and Health Disparity for the American Indians/Alaska Natives* 528, 530 n.2 *in Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* (Brian D. Smedley et al. eds., 2002) (estimating that IHS would need an annual appropriation of $15 billion, as compared with current appropriation of approximately $2.5 billion, to meet the health care needs of all American Indians and Alaska Natives); J.A. 78 (Shoshone-Paiute Compact, stating that "the Indian Health Services budget is inadequate to fully meet the special responsibilities and legal obligations of the United States to assure the highest possible health status for American Indians"). It would be incongruous in that setting to conclude that each Tribe enjoyed an immediate entitlement to full funding of CSCs upon enactment of the lump-sum appropriation, regardless of the competing demands of other Tribes for actual delivery of health services.

B. The Secretary Was Not Required To Pay The Tribes' Full CSCs Because To Do So Would Have Required Reducing Funds For Programs And Activities Serving Other Tribes

Section 450j-1(b)'s "reduction clause" provides that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe." 25 U.S.C. 450j-1(b); see 25 U.S.C. 450j(i) ("Nothing in this part shall be construed to limit or reduce in any way the funding for any program, project, or activity serving a tribe under this or other applicable law."). That provision entitled the Secretary to limit the payment of CSCs in this case.[10]

1. IHS allocates its entire Indian Health Services lump-sum appropriation either to programs and activities serving Tribes or to inherent federal functions

IHS ultimately apportions its entire lump-sum appropriation for Indian Health Services into one of three broad

---

[10] The Tribes assert as a threshold matter (Br. 42-43), for the first time in this litigation, that the Secretary has "waived" any reliance on the reduction clause because the Secretary should have invoked the clause as a basis for declining to contract. That is incorrect. The reduction clause —like the availability clause to which it is appended—applies in the context of a completed contract and an enacted appropriation, and gives the Secretary authority to withhold the provision of funds under the contract if doing so would require reducing funds for activities serving other tribes. A separate provision of the ISDA specifies five discrete grounds for declining to award a requested contract. 25 U.S.C. 450f(a)(2)(A)-(E). The Tribes bottom their waiver argument in Section 450f(a)(2)(D), which applies when "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a)." That provision pertains to whether the level of full funding proposed by a Tribe is accurate, whereas the reduction clause addresses whether providing funds under the contract would require reducing funding for programs or activities serving other Tribes.

categories of funds: (i) direct program funding for delivery of services at local service units; (ii) contractable funds for administrative support in the Headquarters Office and Area Offices that are allocated among tribes as "tribal shares"; and (iii) funds for inherent federal functions that must be performed by the agency and thus cannot be contracted to a Tribe. See pp. 8-10, *supra*. The funding for those three categories of activities is on a zero-sum basis. Any increase in the amounts paid to Tribes for CSCs necessarily would have required reducing funds in one of those categories.

The Tribes do not suggest that IHS was required to reduce direct program funding at the service unit level in order to make funds available for CSCs. Such funds, by definition, constitute "funding for programs, projects, or activities serving a tribe," and therefore need not be reduced to make funds available to a particular contracting Tribe. 25 U.S.C. 450j-1(b); see J.A. 98 (Shoshone-Paiute Compact) ("Nothing in this Compact or associated Annual Funding Agreement shall be construed to limit or reduce in any way the service[s], contracts or funds that any Indian Tribe or tribal organization is eligible to receive.").

The Tribes contend (Br. 45), however, that while the Secretary was not required to reprogram "funding for programs," he was required to "reprogram *other* agency funding." Insofar as the Tribes mean to suggest that the Secretary was required to divert funds for the agency's contractable *administrative* functions, that suggestion is incorrect. The terms of the reduction clause encompass not just "programs" but also "activities," 25 U.S.C. 450j-1(b), and the ISDA elsewhere describes administrative support as a contractable "activity." 25 U.S.C. 450f(a)(1) (explaining that "administrative activities supportive of, but not included as part of, the service delivery programs that are otherwise contractable" may be included in a self-determination contract). Accordingly, contractable administrative funding, no

less than direct program funding, is a program or activity serving a Tribe. The Secretary therefore was not required to reduce such funding in order to make funds available to pay the Tribes' full CSCs.

The only remaining candidate as a source of funds to pay the additional CSCs that the Tribes seek in this case was the amount needed to fund IHS's inherent federal functions. As we explain in the next section, the Secretary was not required to divert to the two tribal plaintiffs in this case, for their CSCs, the funds needed for IHS to exist as an agency and serve *all* Tribes.

2. The Secretary was not required to make funds for inherent federal functions available to pay CSCs

The Tribes argue (Br. 44, 48), in accordance with the Federal Circuit's decision below in *Thompson*, that the Secretary was obligated to reprogram funds for inherent federal functions to pay their CSCs. That argument is manifestly incorrect. Funds for inherent federal functions, *i.e.*, funds for there even to *be* an IHS, were not available for contracting to Tribes.

a. Even if all IHS programs and activities were assumed by Tribes, there would remain a core set of residual functions that IHS itself would be required to perform in order to continue functioning as a federal agency. J.A. 299 ¶ 13, 386 ¶ 9. Examples of such inherent federal functions include: determination of Secretarial policy including promulgation of regulations and legislative initiatives; formulation of the President's budget; conduct of administrative hearings and appeals; direction and control of federal workforce (including hiring and promotion); management of government property; and control of treasury accounts. See Final Report of

Indian Health Service/Tribal Residual Workgroup (Feb. 1995).[11]

There is nothing novel in IHS's determination that its core agency functions could not be contracted to Tribes. See OMB, *Policy Letter on Inherently Governmental Functions*, 57 Fed. Reg. 45,096 (1992). A contrary conclusion would be untenable. In 1996, for example, IHS confronted a cumulative shortfall in funding for CSCs of $43 million. J.A. 215 ¶ 8. The same year, IHS allocated a total of $36 million of its lump-sum appropriation to inherent federal functions. J.A. 562. If, as the Federal Circuit believed, the Secretary was obligated to reprogram funds for inherent federal functions to pay the underfunded amount of CSCs, the agency was required to contract itself out of existence. Congress could not have intended that result. Congress did not compel the agency to shut its doors and cease operations—and thereby to render itself unable to contract with *any* Tribes—in order to enable the payment of full CSCs to some Tribes.[12]

b. The understanding that the agency's inherent federal functions cannot be assumed by Tribes runs throughout the ISDA. The statute assumes that certain activities proposed for inclusion in a self-determination contract are "beyond the

[11] The Residual Workgroup, which included both tribal and agency representatives, was established by IHS in September 1994, to develop principles for identifying the resources the agency must retain to perform its inherent federal functions. The Residual Workgroup completed its activities in January 1995, and issued a final report in February 1995. That report was distributed to all Tribes.

[12] See, *e.g.*, 25 U.S.C. 1661(a) ("[T]here is established within the Public Health Service of the Department of Health and Human Services the Indian Health Service."); 25 U.S.C. 1661(b) ("The Indian Health Service shall be an agency within the Public Health Service of the Department of Health and Human Services."); 25 U.S.C. 1661(c) ("The Secretary shall carry out through the Director of the Indian Health Service * * * all health programs under which health care is provided to Indians based upon their status as Indians which are administered by the Secretary.").

scope of [contractable] programs" because they encompass "activities that cannot lawfully be carried out by the contractor." 25 U.S.C. 450f(a)(2)(E); see 25 U.S.C. 458aaa-6(c)(1)(A)(ii) (IHS self-governance provisions) (allowing Secretary to decline a request to contract if program or activity "that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe"). To the same effect, Congress was careful to specify, when permitting Tribes to assume "administrative functions," that the authority encompassed only "administrative activities * * * *that are otherwise contractable*." 25 U.S.C. 450f(a)(1) (emphasis added); accord 25 U.S.C. 450j-1(a)(1) (providing for funding of "supportive administrative functions that are otherwise contractable"). The Model Agreement reflects the same understanding. 25 U.S.C. 450*l*(c) (Model agreement § 1(a)(2), providing for "transfer" to a Tribe of "the following related functions, services, activities, and programs (or portions thereof) that are otherwise contractable").

Of particular significance, Congress explicitly recognized the role of "inherent federal functions" when it codified the self-governance provisions for BIA in 1994. In the provision that authorizes the Secretary of the Interior to enter into annual funding agreements, Congress clarified that, "[n]othing in this section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any agreement * * * with respect to functions that are *inherently Federal*." 25 U.S.C. 458cc(k) (emphasis added). By recognizing explicitly that any authorization to contract for inherent federal functions would "expand or alter existing statutory authorit[y] in the Secretary," Congress made plain that at the time of those amendments—which was before most of the contracts at issue in this case were executed—it was well understood that inherent federal functions were not subject to contracting. See 25 C.F.R. 1000.94 (BIA self-governance

regulations stating that "residual functions are those functions that only BIA employees could perform if all Tribes were to assume responsibilities for all BIA programs that the Act permits"); 25 C.F.R. 1000.129(a) (explaining that 25 U.S.C. 458cc(k) "excludes from the program * * * Inherently Federal functions").

It follows that IHS properly retained a portion (approximately two percent) of its lump sum appropriation for those inherent federal functions that must be funded for there to *be* an IHS having capacity to contract with Tribes. The legislative history of the BIA self-governance provisions cements that understanding. The House Report explained that "residual funds which are necessary to carry out those limited functions which may be performed only by a Federal official" may "be held back by the Department in the negotiation of a self-governance agreement." H.R. Rep. No. 653, 103d Cong., 2d Sess. 11 (1994).

When Congress later enacted permanent self-governance provisions for IHS in 2000, it specifically included a definition of "inherent Federal functions" as "those Federal functions which cannot legally be delegated to Indian tribes." 25 U.S.C. 458aaa(a)(4). Congress also enacted a corollary definition of "Tribal share" as "an Indian tribe's portion of all funds and resources that support secretarial programs * * * that are not required by the Secretary for performance of inherent Federal functions." 25 U.S.C. 458aaa(a)(8). An individual Tribe's "tribal share" of administrative support funding thus expressly does *not* include funds necessary for inherent federal functions. The same is true for a Tribe's CSCs. The provisions enacted in 2000 broke no new ground, as the preceding discussion makes clear. To the contrary, the Committee Report states that the definition of inherent federal functions simply "states the obvious." S. Rep. No. 221, 106th Cong., 1st Sess. 5 (1999).

c. Not surprisingly, the Tribes' contracts in this case embrace the basic understanding that funds for inherent federal functions (or "residual" funds) are unavailable to the Tribes. For instance, the 1997 Annual Funding Agreement with the Cherokee Nation reflects the parties' recognition that "resources identified as residual" are "unavailable for tribal share distribution." J.A. 188. That agreement similarly states that the parties "understand that, should the residual amount be decreased," "additional funding [would be] made available." J .A. 199; accord J.A. 267 (1996 Cherokee Nation AFA) ("The parties further agree that some resources identified as residual, or otherwise unavailable for tribal share distribution, may become available for such distribution during FY 1996."); J.A. 275 (same) (parties "understand that, should the residual amount be decreased, this AFA shall be modified to include the Nation's share of additional funding made available by the decrease in residual"). The Shoshone-Paiute agreements are to the same effect.[13] The Tribes thereby acknowledged in the agreements with IHS what the ISDA already made clear: the Secretary was not required to take funds for inherent federal functions and pay them to individual Tribes, whether for CSCs or any other purpose.

---

[13] See J.A. 115 (stating that "Area tribal share was determined using a * * * formula for all Area programs not allocated to the service unit level and not reserved as part of the Area residual amount"); J.A. 118 ("The funds provided under this Agreement have been negotiated using certain residual and categorical line item assumptions."); J.A. 140 ("The amount set forth herein shall be amended to reflect the parties' final agreement regarding the residual level in fiscal year 1997.").

3. The Secretary did not reduce CSC funding in order to pay for "contract administration" or "federal functions" in violation of Section 450j-1(b)

The Tribes argue (Br. 44-46) that the Secretary violated restrictions in 25 U.S.C. 450j-1(b)(1) and (3) by reducing funding for CSCs in order to pay for "contract administration" and "Federal functions." That argument lacks merit.

The relevant provisions state that the "amount of funds required by subsection (a) of this section"—the basic ISDA provision that specifies the funds to be transferred to Tribes —shall "not be reduced to make funding available for contract monitoring or administration by the Secretary" or "to pay for Federal functions." 25 U.S.C. 450j-1(b)(1) and (3). Those constraints by their terms pertain solely to the "amount of funds required by subsection (a)," *i.e.*, 25 U.S.C. 450j-1(a). And the "amount of funds required by subsection (a)" in turn includes only those "administrative functions that are *otherwise contractable.*" *Ibid.* (emphasis added). Accordingly, the constraints in Section 450j-1(b)(1) and (3) could have no application to funds retained by the Secretary to pay for inherent federal functions: those funds are not "contractable."

The Tribes therefore err in arguing (Br. 48) that the Secretary paid for "Federal functions" in breach of Section 450j-1(b)(3) by funding *inherent* federal functions. Funds for inherent federal functions are not within the contractable funds to which Section 450j-1(b)(3) applies in the first place. The Tribes err for the same reason in their arguments (Br. 46, 48) concerning expenses for "contract monitoring" referred to in Section 450j-1(b)(1). Of course, the very existence of a self-determination program requires the Secretary to undertake *some* contract-related functions as part of his inherent federal functions. See 25 U.S.C. 450c(f) (requiring contracting Tribe to submit single-agency audit report to

Secretary); 25 U.S.C. 450f(a) (describing procedures for Secretary to enter into self-determination contract or issue declination determination); 25 U.S.C. 450j(b) (providing for Secretary to transfer funding to contracting Tribe); 25 U.S.C. 450m (providing for rescission of contract by Secretary based on maladministration of program by contracting Tribe). See generally OMB, *Policy Letter*, 57 Fed. Reg. at 45,103 (including among illustrative list of inherently federal functions "[a]pproval of any contractual documents," "[a]warding contracts," "[a]dministering contracts," and "[t]erminating contracts").

Section 450j-1(b) was not intended to strip IHS of the ability to perform those functions, which are critical to the existence and integrity of the very contracting process the Tribes have invoked. Paragraphs (1) and (3) of Section 450j-1(b) have the quite different purpose of "protecting and stabilizing the funds for * * * programs from inappropriate administrative reduction by Federal agencies," such as the use of "tribal contract funding to pay for Federal computer equipment acquisition." S. Rep. No. 274, *supra*, at 30. Those provisions serve to ensure, for example, that once the funds for inherent federal functions are set aside, the funds that *are* available to support health services and CSCs of contracting Tribes are not then reduced or diverted to pay for aspects of IHS's operations that are *not* inherent federal functions, such as costs incurred by IHS in its direct delivery of services to Tribes that have chosen not to contract with IHS. Expending funds needed for the agency to perform its inherent federal functions does not constitute an "inappropriate administrative reduction." *Ibid.* It is, rather, an essential measure to ensure the performance of those core functions necessary to implement both IHS's health programs *and* the ISDA. And apart from the 1.5%-2.0% of the Indian Health Services appropriation that IHS allocated to inherent federal functions, the agency left the entire re-

mainder of its functions available for contracting with Tribes that might choose to assume the administration of the programs. See p. 10, *supra*.

There thus is no merit to the Tribe's argument (Br. 44) that the Secretary inappropriately withheld contract funding to "enhance his own bureaucracy." Indeed, from 1993 to 2000, IHS Headquarters' staff was reduced by 57%, and IHS staff in the Area Offices was reduced by 55%. S. Rep. No. 221, *supra*, at 2. In the view of the House Appropriations Committee, "[w]e have reached a point at which we can no longer offset [contract support] costs to any great extent by continuing to downsize the Federal bureaucracies in BIA and IHS. To do so would be unfair to the many tribes who choose not to manage their own programs and rely on the BIA and the IHS for program management." H.R. Rep. No. 609, 105th Cong., 2d Sess. 125 (1998).

4. *The Secretary was not required to pay for CSCs with the agency's nominal unobligated balances at the close of the fiscal year*

In their search for some source of full funding for their CSCs for the years in issue, the Tribes finally contend in passing (Br. 48-49) that the Secretary should have paid for their CSCs with the nominal, unobligated balances remaining in the agency's accounts at the close of each fiscal year. That is incorrect. To begin with, the unobligated balances for fiscal years 1994 to 1996 ranged from $1.2 million to $6.8 million, J.A. 508, 511, 516; see *Thompson* Pet. App. 33a, and therefore were insufficient to make up the aggregate shortfall in funding for CSCs. See J.A. 393 ¶ 43 ($21.9 million shortfall in 1995 for new and expanded contracts); J.A. 215 ¶ 8 ($43 million shortfall in 1996 for all contracts). Accordingly, even if the Secretary had been required to pay for CSCs with those balances, there is no reason that those funds would have flowed exclusively—or even at all—to the

Tribes in this case as opposed to the many other Tribes who were not paid full CSCs.[14]

In any event, the Secretary had no obligation to pay for CSCs with the unobligated balances. Those nominal balances reflect the need for Executive officers to ensure from the outset of the fiscal year that they will avoid obligating funds in excess of appropriations in violation of the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(A). Agencies are required to have in place a system for administrative control of funds to prevent obligations in excess of appropriations, see 31 U.S.C. 1514(a)(1), and a necessary feature of the system is that it allow an agency to pinpoint the particular person responsible for any unlawful obligation, OMB Circular No. A-11, § 150.2 (2004). Part of IHS's method of administrative control under its programs is the allocation of the aggregate funding among local service units and Tribes at the *beginning* of the fiscal year, so that persons responsible for each portion will know where they stand and can plan accordingly. It is a routine feature of prudent planning under such a system that there will be minor balances in some of the accounts at the *end* of the fiscal years. The existence of these incidental balances at the close of the fiscal year does not mean that the allocation of funds among service units and Tribes at the beginning of the year was improper and must be "corrected" by recalculating contract and program amounts previously awarded and apportioning the minor

---

[14] The Tribes erroneously rely (Br. 12) on balance figures reported in the President's Budget. IHS is required to report in the President's Budget "all unobligated balances available for obligations (appropriations, authority to borrow, contract authority, fund balances)." OMB Circular No. A-11, § 82.8 (2004). Those sums may include funds that could not be used for CSCs because they are earmarked by statute for particular purposes. The sums also include collections from Medicare, Medicaid, and private health insurance, which IHS is required to use for improvements to facilities and to provide additional health care services. See 42 U.S.C. 1395qq(c).

remaining balances among them. IHS has reasonably provided for a definite, not a rolling, method of funding.

Furthermore, the balances in IHS's accounts in the relevant years represented approximately 0.1% to 0.3% of the $1.7 billion appropriation. Those sums are used in subsequent years to liquidate obligations that had not been recorded by the close of the fiscal year but are properly chargeable to that year's accounts. See 31 U.S.C. 1551, 1552; J.A. 218 ¶ 16, 303 ¶ 27. There thus is no basis for holding that the Secretary was required to collect the balances at the close of the fiscal year and use them to pay for the shortfall in CSCs.

C. The ISDA's Availability Clause Contemplates More Than The Mere Availability Of A Lump-Sum Appropriation

As explained above, payment of full CSCs to the Tribes would have required the Secretary either to divert the funds needed to support inherent federal functions or to "reduce funding for programs, projects, or activities serving a tribe," 25 U.S.C. 450j-1(b). Because of those barriers to paying the full amount of the Tribes' CSCs, there is no need for the Court to consider the applicability, standing alone, of the "availability" clause in Section 450j-1(b). That statutory clause, however, and the implementing "availability" clauses in IHS's contracts with individual Tribes, independently support the Secretary's funding determinations.

1. The text and history of the availability clause and its context within the ISDA demonstrate that the Tribes' interpretation is incorrect

a. The Tribes argue that the ISDA's availability clause is satisfied as long as the total amount of the lump sum appropriation for IHS exceeds the amount that would be necessary to pay each Tribe's own CSCs. That cannot be correct.

The rule the Tribes propose, of course, would always be satisfied if each individual Tribe is considered in isolation, because the lump sum appropriation would dwarf any one Tribe's own share of the total. But the availability of funds under the ISDA must be considered in light of the fundamental reality that the lump sum appropriation is intended to be allocated among numerous local service units that furnish tribal services, either directly by IHS or by Tribes that have elected that option under the ISDA. The availability of funds for any one Tribe therefore must be considered in light of that intervening allocation.

A hypothetical example demonstrates the point: suppose Congress were to slash the lump sum appropriation for IHS in half. The obvious purpose and effect of such a cut would be that programs serving individual Tribes (either directly or by ISDA contract) would have to be cut in turn, along with their corresponding CSC amounts. Under the logic of the Tribe's position, however, because the lump sum appropriation would still exceed the amount needed for any one Tribe, the entire lump sum would still be "available" to every individual Tribe considered in isolation. Congress did not intend for its explicit—and constitutionally rooted (see U.S. Const. Art. I, § 9, Cl. 7)—reservation of control over the availability of funds through the appropriation process to be rendered ineffectual in this manner.

A federal agency that administers programs directly is constrained by the need to allocate limited funds among competing priorities. IHS operated under such constraints when it directly administered all health programs at numerous local service units. When a Tribe steps into the shoes of IHS at a particular location and assumes the administration of federal services at that location, the Tribe likewise assumes the constraints arising from the need to allocate funds among competing demands on an agency-wide basis. "Availability of appropriations" in the context of the ISDA and

implementing agreements is therefore not determined by the mere facial availability of a lump-sum appropriation for the type of program a particular Tribe wants to operate.

b. The point is reinforced by textual differences between the availability clause in the ISDA and the availability clauses relied on by the Tribes. Virtually every one of the 50 availability clauses described by the Tribes as a "common feature in the landscape of government contract law," Br. 34; see *Cherokee* Pet. App. 78a-87a (listing statutes), speaks in terms of subjecting the "authority" of a government officer to "enter into contracts" to the furnishing of appropriations by Congress.[15] The purpose of those provisions is to make clear that an agency lacks authority to obligate the government fisc unless Congress makes sufficient appropriations legally available.[16]

The availability clause in Section 450j-1(b) is not intended solely to impose that constraint. Indeed, another provision, which has been part of the ISDA since its enactment, see Pub. L. No. 93-638, § 106(c), 88 Stat. 2211, already serves

[15] The sole exception is 12 U.S.C. 1715z-1(i)(1).

[16] The Anti-Deficiency Act generally bars a government officer from obligating the government to pay money in advance of, or in excess of, congressional appropriations. 31 U.S.C. 1341(a)(1); see 2 *GAO Redbook* 6-12 to 6-19. An exception to that constraint arises when Congress confers "contract authority" to bind the government without regard to appropriations. See *id.* at 6-50 to 6-53; see also *Train* v. *New York*, 420 U.S. 35, 39 n.2 (1975). The basic authority of all agencies to enter into contracts is not "contract authority," because that basic authority is contingent on the availability of appropriated funds. See 2 *GAO Redbook* 6-50 to 6-51. "Contract authority" requires "not only authority to enter into a contract, but authority to do so *without regard to the availability of appropriations*." *Id.* at 6-51 (emphasis added); see 1 *GAO Redbook* 2-6. By specifying in a statute that the "authority" of an agency "to enter into contracts" is conditioned on the availability of appropriations, *e.g.*, 25 U.S.C. 1658, Congress makes clear that the agency lacks "contract authority" to bind the government without regard to appropriations.

that function. 25 U.S.C. 450j(c) ("The amounts of [self-determination] contracts shall be subject to the availability of appropriations."). Section 450j-1(b) addresses "the provision of funds" by the Secretary rather than the authority of the Secretary to "enter into a contract," and far from merely a *limit* on the ability obligate the fisc, it is an affirmative *grant* of authority to the Secretary to adjust funding levels based on appropriations. 25 U.S.C. 450j-1(b); see 25 U.S.C. 458aaa-18(b) (same).

c. The legislative history surrounding the enactment of the availability clause in 1988 reinforces that it was intended to do more than limit the agency's ability to obligate the fisc. The draft legislation before the Senate Select Committee on Indian Affairs did not contain the "availability" and "reduction" clauses ultimately codified in Section 450j-1(b), but it did contain the separate availability provision codified in 25 U.S.C. 450j(c). See S. Rep. No. 274, *supra*, at 79. In response to the provisions that added funding for CSCs, see p. 6, *supra*, the Director of IHS expressed concerns that those "costs would be more than the IHS would have available for the program's direct operation" and that "IHS would be required to obtain the funds from elsewhere in the IHS system." S. Rep. No. 274, *supra*, at 57. The Director supported "changes in the bill that would allow a small reduction in contract funding" to "allow IHS to pursue equitable distribution of funding," and he stated that the agency would assist "in devising language to that effect." *Ibid.*

BIA likewise sought to "clarify" in the legislation "that requested contracts are subject to the availability of funds for the program or portion thereof involved and that the Secretary is not required to divert funds from BIA operated programs or portions thereof serving other Indians to fund[] the requested contract." S. Rep. No. 274, *supra*, at 48. In addition, the Congressional Budget Office, in discussing the budgetary implications of the CSC provisions, observed that

"[b]ecause IHS and BIA activities are discretionary and must be funded through subsequent appropriations action, this language could have the effect of requiring contract costs to be met first and limiting funding for remaining activities within IHS and BIA," *id.* at 42—*i.e.*, the position urged by the Tribes.

After those concerns had been expressed, and in apparent response to them, the House of Representatives added the "availability" and "reduction" clauses now codified in Section 450j-1(b). H.R. 1223, 100th Cong., 1st Sess. § 205 (1988). Congress's evident purpose was to ensure that the ISDA did not "have the effect of requiring contract costs to be met first and limiting funding for remaining activities within IHS." S. Rep. No. 274, *supra*, at 42.

d. Congress also made clear elsewhere in the ISDA that it did not intend to require full funding of CSCs in advance of other priorities. In the same 1988 amendments that added provisions allowing for funding of CSCs, Congress required the Secretary to submit an annual report setting forth, *inter alia*, "an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted." 25 U.S.C. 450j-1(c). There would have been no need for that provision if Congress intended that the Secretary would be required to pay CSCs in full from the lump sum appropriation in advance of competing demands.

In addition, the annual $7.5 million appropriation for the ISD Fund in the relevant fiscal years indicates that Congress did not consider the Secretary legally bound to pay full CSCs before allocating the remainder of the lump-sum appropriation. The appropriations act for each relevant year specified that $7.5 million "shall remain available" for CSCs for new and expanded contracts. See pp. 11-12, *supra*. An appropriation in the "'shall be available' family of earmarking language presumptively 'fences in' the earmarked sum

(both maximum and minimum)." 2 *GAO Redbook* 6-8. But under the Tribes' view that the appropriation only operated as a minimum (Br. 35-37), if Congress believed that the Secretary was obligated to pay CSCs in full, there would have been no need for Congress to specify that $7.5 million was to be used to pay CSCs associated with new or expanded contracts.[17]

Finally, when Congress in 2000 permanently codified the self- governance provisions for IHS, it intentionally included the same availability language as appears in Section 450j-1(b). See 25 U.S.C. 458aaa-18. By that time, the Secretary's administration of ISDA funding and interpretation of the availability clause were well established. By enacting the same language in the self-governance provisions, Congress indicated its approval of the Secretary's interpretation. See *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").[18]

---

[17] It is true that the $7.5 million appropriation not only earmarked a particular amount but also specified that any unused funds would "remain available" in subsequent fiscal years. *E.g.*, Department of the Interior and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-212, 3009-213. But IHS had established the queue system and had consistently exhausted the $7.5 million appropriation before the end of each fiscal year, a fact of which Congress presumably was aware. See S. Rep. No. 319, *supra*, at 90 (referring approvingly to IHS Circular 96-04, which continued queue system). Accordingly, under the Tribe's reading of the appropriation, the sole practical purpose of earmarking $7.5 million was to require the Secretary to spend that amount on CSCs for new and expanded programs, a purpose incompatible with any belief that enactment of the lump-sum appropriation *automatically* entitled the Tribes to full funding of CSCs.

[18] In 2000, the House Committee on Resources reported favorably on proposed legislation that would have excised the availability clause from the ISDA and would have established a legal entitlement to full funding of

2. The Tribes' interpretation of the appropriations acts is erroneous.

a. The Tribes argue (Br. 25, 30) that their interpretation of the availability clause is bolstered by language in the annual appropriations acts stating that "funds made available to tribes and tribal organizations through contracts * * * authorized by the [ISDA] shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation." *E.g.*, Department of the Interior and Related Agencies Appropriations Act, 1994, Tit. II, Pub. L. No. 103-138, 107 Stat. 1408. According to the Tribes, because the funds were "deemed to obligated at the time of the grant or contract award," the appropriations acts themselves established a requirement to fund CSCs in full.

That argument lacks merit. That the "funds made available" through self-determination contracts are "deemed to be obligated" sheds no light on the *amount* of funds so obligated. And there is no suggestion in the appropriations acts of an intention to require that any particular sums be obligated to self-determination contracts. Compare, *e.g.*, 107 Stat. 1408 ("of the funds provided, not less than $11,526,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act, as amended"). The evident purpose of the "deemed to be obligated" language is to establish that the "funds made available to tribes"—whatever the amount—are obligated and "shall remain available" for that purpose and thus are immune from administrative deobligation and reprogramming to a different purpose. See 2 *GAO Redbook* 7-51 to 7-53 (discussing deobligation by agency).

CSCs. See H.R. Rep. No. 837, 106th Cong., 2d Sess. (2000). Congress did not enact the legislation.

b. There likewise is no merit to the Tribes' reliance (Br. 29) on the fact that Congress included a "not to exceed" cap on CSC funding in the BIA appropriation in the relevant fiscal years, or that Congress in later years began including such a cap in IHS's appropriation. The question in this case is not whether IHS was *prohibited* from paying full CSCs in the relevant years, but whether the agency was *required* to do so. And for the reasons explained, the ISDA's availability and reduction clauses as well as its provisions concerning inherent federal functions establish that the Secretary was not required to pay full CSCs to Tribes ahead of all other demands on IHS's scarce resources. Given the litigation that had nonetheless arisen over whether IHS was required to fund full CSCs, it is understandable that Congress would choose to ensure that result in the future by enacting an explicit statutory cap in the appropriations acts.

II. SECTION 314 OF THE 1999 APPROPRIATIONS ACT BARS THE TRIBES FROM RECOVERING CONTRACT SUPPORT COSTS FOR FISCAL YEARS 1994-1998

A. Section 314 Establishes That The Secretary Was Not Required To Distribute Additional CSC Funds In The Relevant Years

In Section 314 of the 1999 appropriations act, Congress provided that, "[n]otwithstanding any other provision of law," the "amounts appropriated to or earmarked in committee reports for the * * * Indian Health Service" for "payments to tribes * * * for contract support costs * * * are the total amounts available for fiscal years 1994 through 1998 for such purposes." Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-227, § 314, 112 Stat. 2681-288. In each of the fiscal years referenced by Section 314, the appropriations act allocated $7.5 million to the ISD Fund for CSCs associated with new and expanded contracts, and the committee reports ear-

marked a total sum to be spent overall on CSCs. The Secretary in turn distributed corresponding amounts of CSC funds to contracting Tribes. See J.A. 218 ¶ 17, 302 ¶ 24. Section 314 operates to establish that the sums distributed by the Secretary "are the total amounts available" for CSCs in those years. 112 Stat. 2681-288.

By using the term "available" in Section 314, Congress directly tracked the terms of Section 450j-1(b)'s availability clause and the contractual provisions implementing the clause. That clause renders "the provision of funds" by the Secretary for CSCs "subject to the availability of appropriations." 25 U.S.C. 450j-1(b). When Congress directed in Section 314 that the amount of funds for CSCs distributed by the Secretary in the relevant fiscal years "are the total amounts available for those years," Congress directly ratified the Secretary's decision to distribute those, and only those, amounts.

The legislative history of the 1999 appropriations act confirms that understanding. The Senate Report expressed "concern[] about continuing and growing funding shortfalls in contract support costs," and observed that "in several cases the Federal courts have held the United States liable for insufficient CSC funding." S. Rep. No. 227, 105th Cong., 2d Sess. 51-52 (1998). In the same appropriations act, moreover, Congress enacted a one-year moratorium on payment of CSCs for new and expanded contracts, and Congress also, as it had done for the first time the previous year, placed an explicit statutory ceiling on IHS's funding for CSCs. See p. 14, *supra*. Congress's purpose in Section 314 was to clarify the limits on the funds available to Tribes for CSC funding in fiscal years 1994 to 1998. See H.R. Rep. No. 609, *supra*, at 124 ("Section 314 limits payments for contract support costs in past years to the funds available in law and accompanying report language for those years.").

B. The Tribes' Interpretation Of Section 314 Is Incorrect

1. The Tribes argue that Section 314 was intended only to establish that, during fiscal year 1999, the agency was prohibited from using any leftover funds from fiscal years 1994 to 1998 to pay for CSCs for those years. But "Congress plainly said that the appropriated amounts were the total amounts available. Congress did not say that it meant only to restrict the Secretary's authority to spend unobligated balances." *Shoshone-Bannock Tribes*, 279 F.3d at 668.

The Tribes' argument that Section 314 is limited to addressing the use of leftover balances also cannot be squared with the fact that Congress has reenacted the provisions of Section 314 in each subsequent appropriations act. *E.g.*, Pub. L. No. 108-108, § 308, 117 Stat. 1303.[19] The authority to use leftover balances from a particular fiscal year expires after a five-year period, at which time the accounts are closed and any remaining funds revert to the Treasury. See 31 U.S.C. 1552(a). Congress nonetheless has specified when reenacting the provisions of Section 314 in later years that the provisions apply to all preceding years beginning with 1994. See, *e.g.*, 117 Stat. 1303 ("amounts appropriated to or earmarked in committee reports * * * for payments to tribes and tribal organizations for contract support costs * * * are the total amounts available for fiscal years 1994 through 2003 for such purposes"). If Congress's sole intention in Section 314 was to prevent the use of leftover balances, there would be no reason for Congress to apply its

---

[19] See Department of the Interior and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-113, § 313, 113 Stat. 1501A-192; Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, § 312, 114 Stat. 988; Department of the Interior & Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, Tit. II, 115 Stat. 456; Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. F., Tit. III, § 308, 117 Stat. 271.

provisions to fiscal years for which the five-year period has elapsed and the accounts have been closed.

2. There is no merit to Tribes' argument (Br. 40-41) that the government's understanding of Section 314 raises serious constitutional questions. The Tribes principally rely on this Court's decision in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). As the Court has explained, however, "[w]hatever the precise scope of *Klein*," it has no application when Congress "changes the law (even if solely retroactively)." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); see *Robertson* v. *Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992).

Before Section 314, the amounts earmarked for CSCs in the committee reports for the relevant fiscal years had not been enacted by Congress, although they furnished a proper framework for the Secretary's allocation of the lump sum appropriation among programs serving individual Tribes. Section 314 "changed the law" by incorporating those earmarks into positive law, and clarifying that the earmarks are the total amounts available for CSCs in the specified years. See, *e.g.*, *Red Lion Broadcast. Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). Congress thereby removed any doubt about the propriety of the Secretary's allocation.[20] Congress did not purport to direct any court to reach a particular result in any pending case, and Congress of course can change the law in a manner that affects ongoing litigation.

The circumstances here are in the nature of situations where Congress retroactively ratifies agency action that Congress could have authorized at the time the action was taken. This Court has found it "elementary" that Congress possesses such a "power of ratification." *United States* v. *Heinszen & Co.*, 206 U.S. 370, 382-388 (1907) (upholding retroactive ratification of tariff that was illegal when exacted); see *Swayne & Hoyt* v. *United States*, 300 U.S. 297, 301-303 (1937); *Rafferty* v. *Smith, Bell, & Co.*, 257 U.S. 226 (1921). Cf. *United States* v. *Carlton*, 512 U.S. 26 (1994). Such ratifications apply to cases pending on the date of enactment and eliminate a right to relief that would otherwise exist. *Heinszen*, 207 U.S. at 384-391; see *Swayne & Hoyt*, 300 U.S. at 301-302.

In this case, similarly, even if the Secretary initially erred in funding CSCs at the levels earmarked in the committee reports, the furnishing of funds in that manner under the agreements with individual Tribes was at all times "subject to the availability of appropriations," notwithstanding any other provision in the ISDA. 25 U.S.C. 450j-1(b). Congress could have capped CSC funding at those levels by including such a provision in the appropriations acts rather than the committee reports. In Section 314, Congress ratified the Secretary's actions taken under longstanding budgeting practice and an allocation framework of which all Tribes were fully aware from the outset of the funding year. From that point forward during the fiscal year, the Tribes could elect to discontinue performing services under their agreements with IHS if they were dissatisfied with the level of funding for their CSCs. See pp. 4-5, *supra*. Nothing in the Constitution prevented Congress from ratifying the Secretary's allocation practices in response to the questions that had arisen from the competing demands of individual tribal programs. Congress's ratification, under this Court's decisions, applies to pending lawsuits. *Heinszen*, 207 U.S. at 384-391; see *Swayne & Hoyt*, 300 U.S. at 301-302.[21]

---

[20] That allocation of course was independently supported by the provisions of the ISDA that set aside funds for inherent federal functions and that prevent reductions in programs for some Tribes in order to furnish funds to others. See pp. 27-45, *supra*.

[21] The Tribes argue (Br. 40) that they gained a vested and indefeasible entitlement to full payment of CSCs upon enactment of the lump sum appropriation in each year from 1994 to 1997, and that Congress could not abrogate that entitlement retroactively. Even assuming the Tribes could

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit in *Cherokee Nation* v. *United States*, No. 02-1472, should be affirmed, and the judgment of the Federal Circuit in *Thompson* v. *Cherokee Nation*, No. 03-853, should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
SRI SRINIVASAN
Assistant to the Solicitor General
BARBARA C. BIDDLE
JEFFRICA JENKINS LEE
Attorneys

ALEX M. AZAR II
General Counsel
BARBARA J. HUDSON
Branch Chief
JOCELYN S. BEER
JULIA PIERCE
HILARY FRIERSON
Attorneys
Department of Health and Human Services

SEPTEMBER 2004

---

assert a constitutional challenge in these circumstances, cf. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966) (States are not "persons" protected by the Due Process Clause of the Fifth Amendment), the Tribes' expectation of CSC funding—given the availability clause in the ISDA and the Tribes' agreements with IHS—was always contingent on the availability of appropriations. In these circumstances, under a government-to-government program in which Tribes stepped into the shoes of IHS in administrating federal programs *as* a government, the Tribes did not acquire vested rights of the sort that could defeat Congress's constitutional authority to enact a curative statute to resolve ongoing issues concerning the allocation of funding under the overall IHS program. See *Swayne & Hoyt*, 300 U.S. at 302-303; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-19 (1976). Cf. *Bowen* v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 53-56 (1986) (Congress reserved authority to amend Social Security Act and that power extends to agreements with States entered into in conformity with the Act).

(14) (12)

Nos. 02-1472 & 03-853

IN THE

Supreme Court of the United States

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, *et al.*,
Respondents.

TOMMY G. THOMPSON, Secretary of Health and Human Services,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth Circuit and for the Federal Circuit

REPLY BRIEF FOR CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES

CARTER G. PHILLIPS
STEPHEN B. KINNAIRD
HOWARD J. STANISLAWSKI
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LLOYD B. MILLER *
ARTHUR LAZARUS, JR., PC
HARRY R. SACHSE
WILLIAM R. PERRY
MELANIE B. OSBORNE
AARON M. SCHUTT
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

* Counsel of Record

Counsel for Cherokee Nation and Shoshone-Paiute Tribes

TABLE OF CONTENTS

	Page
ARGUMENT	
A. The Tribes' Agreements Are Enforceable Contracts	1
B. The Government's Reading of § 450j-1(b) Is At War With The Plain Language and Purpose Of The Act	6
The availability clause	7
The reduction clause	11
C. Section 314 Cannot Undo The Secretary's Breach	16
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Page
Biodiversity Assoc. v. Cables, 357 F.3d 1152 (10th Cir. 2004)	20
Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539 (Ct. Cl. 1980)	1, 4, 8
Bowen v. Massachusetts, 487 U.S. 879 (1988)	9
Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41 (1986)	19
Bradley v. United States, 98 U.S. 104 (1878)	10
Busby Sch. of the N. Cheyenne Tribe v. United States, 8 Cl. Ct. 596 (1985)	5
Church of Scientology of Cal. v. IRS, 484 U.S. 9 (1987)	10
Ferris v. United States, 27 Ct. Cl. 542 (1892)	1, 8
INS v. St. Cyr, 533 U.S. 289 (2001)	18
Int'l Union v. Donovan, 746 F.2d 855 (D.C. Cir. 1984)	10
Jones v. R.R. Donnelley & Sons Co., 124 S.Ct. 1836 (2004)	9
Kaiser Alum. & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990)	19
Leiter v. United States, 271 U.S. 204 (1926)	10
Lincoln v. Vigil, 508 U.S. 182 (1993)	4, 8
Lynch v. United States, 292 U.S. 571 (1934)	1, 4
Mobil Oil Exploration and Producing S.E. Inc. v. United States, 530 U.S. 604 (2000)	1, 4
O'Gilvie v. United States, 519 U.S. 79 (1996)	18
Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969)	18
Robertson v. Seattle Audubon Soc., 503 U.S. 429 (1992)	20
Sutton v. United States, 256 U.S. 575 (1921)	1
Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297 (1937)	20

TABLE OF AUTHORITIES—Continued

	Page
The Clinton Bridge, 77 U.S. (10 Wall.) 454 (1870)	20
Train v. City of New York, 420 U.S. 35 (1975)	10
United States v. Klein, 80 U.S. (13 Wall.) 128 (1871)	18, 19, 20
United States v. New Mexico, 455 U.S. 720 (1982)	4
United States v. Winstar Corp., 518 U.S. 839 (1996)	1, 4, 18, 19

STATUTES

10 U.S.C. 1089(a)	3
15 U.S.C. 636(m)(7)(B)(i)	9
16 U.S.C. 5608(b)	9
20 U.S.C. 4357(b)(2)	9
25 U.S.C. 450b(f)	2
25 U.S.C. 450f(a)(1)	15
25 U.S.C. 450j(a)	2
25 U.S.C. 450j(c)	9
25 U.S.C. 450j-1(a)	2, 5, 9, 12
25 U.S.C. 450j-1(a)(1)	12
25 U.S.C. 450j-1(a)(2)	12
25 U.S.C. 450j-1(b)	*passim*
25 U.S.C. 450j-1(b)(1)	12, 15
25 U.S.C. 450j-1(b)(2)(A)	9
25 U.S.C. 450j-1(b)(3)	12, 15
25 U.S.C. 450j-1(b)(4)	12
25 U.S.C. 450j-1(c)(2)	10
25 U.S.C. 450j-1(g)	2, 5, 9
25 U.S.C. 450k(a)(1)	3
25 U.S.C. 450l(c)	5
25 U.S.C. 450l(c)(sec. 1(a)(2))	9
25 U.S.C. 450l(c)(sec. 1(b)(5))	3

TABLE OF AUTHORITIES—Continued

	Page
25 U.S.C. 450l(c)(sec. 1(b)(11))	3
25 U.S.C. 450m-1	5
25 U.S.C. 450m-1(a)	2
25 U.S.C. 450m-1(a)(1)	5
25 U.S.C. 450m-1(d)	2
25 U.S.C. 640d-27(a)	9
25 U.S.C. 1621f(a)	16
25 U.S.C. 1642(a)	16
25 U.S.C. 1680c(d)	3
29 U.S.C. 1907(b)(2)	9
29 U.S.C. 3012(b)(3)(B)	9
31 U.S.C. 1341(a)(1)	8
31 U.S.C. 1341(a)(1)(A)	8
31 U.S.C. 1552(a)	17
31 U.S.C. 1553(b)(1)	17
42 U.S.C. 1395qq(c)	16
42 U.S.C. 2212	3
42 U.S.C. 13921(a)(3)	9
46 U.S.C. 53106(a)(1)	9
Pub. L. No. 105-277, sec. 314, 112 Stat. 2681-288 (1998)	16, 17, 18, 19, 20

REGULATIONS

41 C.F.R. 3-4.60 (1976)	2
48 C.F.R. 32.705-1(b)	10
48 C.F.R. 52.232-18	9
48 C.F.R. 52.232-20	3
48 C.F.R. 352.280-4 (1987)	2
48 C.F.R. 352.280-4(a) (1987)	3

LEGISLATIVE MATERIALS

134 Cong. Rec. 23340 (1988)	10
H.R. Rep. No. 93-1600 (1974)	10

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 100-274 (1987)	2, 5, 6
S. Rep. No. 100-165 (1987)	3
S. Rep. No. 103-374 (1994)	3
S. Rep. No. 106-221 (1999)	14
REGULATORY MATERIALS	
59 Fed. Reg. 3166 (Jan. 20, 1994)	14
62 Fed. Reg. 1468 (Jan. 10, 1997)	11
68 Fed. Reg. 37511 (Jun. 24, 2003)	11
OTHER AUTHORITIES	
GSA Order ADM 4800.2E (Jan. 3, 2000)	3
Hu Hu Kam Mem. Hosp., 53 FLRA 1200 (Jan. 28, 1998)	3
Owyhee PHS Indian Hosp., and Elko Clinic, 53 FLRA 1221 (Jan. 28, 1998)	3
U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (2d ed. 1992)	8
Yukon-Kuskokwim Health Corp., 341 NLRB No. 139 (May 28, 2004)	3

The Brief for the Federal Parties is notable not for what it says, but for what the Solicitor General fails to argue. The Solicitor General nowhere contends that the Secretary's conduct was not a plain violation of well-settled appropriations and government contract law, as asserted in the Tribes' Opening Brief ("Tr. Br. _"), as exhaustively demonstrated in the *amicus curiae* brief of the U.S. Chamber of Commerce, *et al.* (CoC), and, most significantly, as found by the Federal Circuit.[1] Instead, the Solicitor General attempts to duck the central issue in this case by arguing that the Tribes' Indian Self-Determination Act "contracts" are not real contracts, for the breach of which there are consequences, but rather mere "government-to-government" arrangements or "programs" which, like intra-agency funding guidelines, the Secretary could disregard at will. As the Solicitor General would have it, the Secretary thus had discretion to fund everything he did other than paying these contracts, including his growing administrative expenses, and only then needed to allocate to the contracts whatever he decided was left. This is a stunning proposition, given that Congress twice amended the ISDA precisely to assure Indian tribes that their contracts would be meaningful and enforceable, and to constrain a defiant agency that was historically underfunding those contracts.

A. The Tribes' Agreements Are Enforceable Contracts.

1. Congress in the 1988 and 1994 ISDA Amendments set out to reinforce tribal self-determination contracting as this Nation's core Indian policy by maximizing the conditions necessary to encourage Tribes to contract with the Secretary. Reacting to the Secretary's historic failure before 1988 to fund those contracts in full, together with his success in arguing that ISDA contractors had no remedies when underpaid,

[1] *See* Tr. Br. 26-37; CoC Br. 5-14, 23-25, discussing *inter alia Mobil Oil Exploration & Producing S.E. Inc. v. United States*, 530 U.S. 604 (2000); *United States v. Winstar Corp.*, 518 U.S. 839 (1996); *Lynch v. United States*, 292 U.S. 571 (1934); *Sutton v. United States*, 256 U.S. 575 (1921); *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980); and *Ferris v. United States*, 27 Ct. Cl. 542 (1892).

Congress mandated the precise terms under which contracts "shall" be funded, 25 U.S.C. 450j-1(a), (g); prohibited any reduction in those contracts save in narrow circumstances, § 450j-1(b); and declared ISDA contractors entitled to "money damages" under the Contract Disputes Act (CDA) if the Secretary continued failing to pay, §§ 450m-1(a), (d). Tr. Br. 8-9; NCAI Br. 16-17, 23; S. Rep. No. 100-274, at 34 (1987). In this way, Congress assured skeptical Tribes that never again would the Secretary have unlimited discretion to underfund their contracts, and to leave Tribes operating the Government's hospitals with neither sufficient resources nor viable remedies. Reassured by these measures, the Tribes here signed Annual Funding Agreements (AFAs) at prices the Secretary agreed to, under terms that could not be clearer that only Congress, *not* the Secretary, would have the power to reduce their contract amounts and thus their Federal hospital operations. In this context it is untenable for the Government now to argue that these Tribes were not awarded effective contracts, that their hospitals should have been closed when the funds the Secretary chose to allocate ran out (or else supported by funds diverted from other tribal activities), and that today they have no remedies.

2. The Government's attempt to ground its counterintuitive argument on various statutory terms has no merit. For instance, the Government's insistence that ISDA contracts are not "procurement" contracts (*e.g.*, US Br. 23-25, citing §§ 450j(a), 450b(f)) is a red herring. In fact, ISDA contracts *began* as procurement contracts. *E.g.*, 41 C.F.R. 3-4.60 (1976); 48 C.F.R. 352.280-4 (1987). When, in the course of streamlining and enhancing the enforceability of these contracts, Congress concluded that the procurement rules only increased contract costs with no corresponding benefit, it "decreas[ed] the volume of contract compliance and reporting requirements" by "eliminat[ing] . . . otherwise applicable federal procurement law and acquisition regulations." S. Rep. No. 100-274, at 19; *see also* NCAI Br. 9, 13, 23. This reform had

absolutely nothing to do with the enforceability of ISDA contracts, much less represent a shift to *un*enforceable contracts.

Similarly ill-considered is the new argument that the ISDA's "limitation of cost" clause (which limits a contractor's responsibility after all "funds awarded under [the] Contract" are spent), somehow reinforces the argument that these are not real contracts. US Br. 24, citing § 450*l*(c)(sec. 1(b)(5). Ironically (given the Government's "procurement" argument), that very clause was modeled on an ISDA procurement clause, 48 C.F.R. 352.280-4(a) (1987) ("Clause No. 3–Limitation of Cost"), and such clauses are a common feature of cost-reimbursable contracting. *E.g.*, 48 C.F.R. 52.232-20. The ISDA clause is designed to protect *the contractor*, not lessen the Secretary's duty to pay the full amount awarded.

The Government's new-found reliance on other ISDA provisions (US Br. 25) fares no better. Far from weakening contractors' rights, Congress extended the Federal Tort Claims Act (FTCA) to tribal contractor employees and made them eligible to access the Federal Supply Schedule (FSS) simply to save money. S. Rep. 100-165, at 112 (1987) (FTCA measure "to ameliorate the high cost of liability and malpractice insurance"); S. Rep. 103-374, at 8 (1994) (FSS measure to reduce "substantially increased . . . cost[s]"). Congress's extension of these cost-saving measures to government contractors is hardly unprecedented, and they neither lessen the contractual nature of the relationship nor magically convert contractors into "an agency" of the Government (US Br. 24).[2]

[2] *E.g.* 10 U.S.C. 1089(a); 25 U.S.C. 1680c(d); 42 U.S.C. 2212 (all extending FTCA coverage to various private individuals or contractors); GSA Order ADM 4800.2E (Jan. 3, 2000) (listing contractors and other non-federal entities eligible to use the FSS system). *See also Yukon-Kuskokwim Health Corp.*, 341 NLRB No. 139, at 2 (May 28, 2004) (contractor "is not an arm of the Federal Government" and not "in [its] shoes"); *Hu Hu Kam Mem. Hosp.*, 53 FLRA 1200, 1208 (Jan. 28, 1998) (contractors are not "transform[ed]. . . into executive branch agencies"); *Owyhee PHS Indian Hosp. and Elko Clinic*, 53 FLRA 1221 (Jan. 28, 1998) (same); 25 U.S.C. 450k(a)(1), 450*l*(c)(sec. 1(b)(11)) (ISDA contractors

Congress intended all these measures to induce Tribes to shoulder the heavy responsibility for administering Federal health care facilities within their communities by maximizing their contract rights, not to subvert the contracted program by leaving them with no rights once the Secretary cut their funding. Tr. Br. 9; NCAI Br. 15-17. What is decisive here–and what the Secretary ignores–is that Congress spoke time and again of awarding *binding* contracts, *id.* And the law controlling government contracts applies equally to all contracts, be they implied from an exchange of writings (*Winstar*), settlement agreements (*Blackhawk*), leases (*Mobil Oil*), insurance policies (*Lynch*), or ISDA contracts.

3. Much of the Secretary's approach is constructed on the faulty premise that Congress intended Tribes operating ISDA contracts to be on an absolute equal footing with other Tribes.[3] From this the Government argues that the Secretary's generally unreviewable discretion to allocate a lump-sum appropriation to address the needs of other Tribes, *Lincoln v. Vigil*, 508 U.S. 182 (1993), also means the Secretary retained complete discretion to fund or not to fund ISDA contracts. Aside from disregarding the Act, that formulation perversely ends up treating contractors *worse* than non-contracting Tribes, for it forces contracting Tribes to *reduce* hospital services on their reservations to make up for the Secretary's failure to fund their fixed contract support costs

exempt from agency "nonregulatory requirement[s]," "program guidelines, manuals, or policy directives"). *Cf., United States v. New Mexico*, 455 U.S. 720 (1982) (advance-funded cost-reimburseable contractor that procures on behalf of Government does not stand in its shoes).

[3] Although the Government claims IHS is only trying to treat all tribes "similarly" (US Br. 25), indisputably by its own statistics it is not: Oklahoma Tribes comprise one of the two most *poorly* funded parts of the IHS system (http://www.ihs.gov/NonMedicalPrograms/Inf/), and the Secretary's failure to fund the Shoshone-Paiute's Owyhee Hospital contract led to such severe cutbacks (JA 60) that the Hospital nearly lost its accreditation. Notions of equity did not drive IHS's failure to pay.

(CSCs), while the remainder of IHS's operations remain unaffected.

Plainly Congress *did* prioritize the interests of ISDA contractors, both in the operation of contracted hospitals, and in the protection those contracts (and the Indian people served) would have from excessive agency oversight and unilateral funding reductions. NCAI Br. 13-15. The purpose, of course, was not to elevate some Tribes, but to elevate as this Nation's leading Indian policy the principle of tribal self-determination embodied in the ISDA contracting process. The result is that the Secretary does indeed owe unique responsibilities to ISDA contractors. Far from leaving an ISDA contract the "product of [IHS's] overall allocation mechanism among Tribes" (US Br. 25), the Secretary remains bound by detailed contract funding requirements (§§ 450j-1(a), (b), (g)); must restate those requirements in a Model Contract (§ 450*l*(c)); and faces a "money damages" remedy when he fails to pay (§ 450m-1(a)(1)). In these ways Congress purposefully swept aside earlier rulings that had declared pre-1988 contracts to be unenforceable–the *precise* argument the Government resurrects here. S. Rep. No. 100-274, at 34 (§ 450m-1 overrules *Busby Sch. of the N. Cheyenne Tribe v. United States*, 8 Cl. Ct. 596 (1985)).

4. The Government cannot justify with word-games why, when procurement contractors conduct outsourced functions otherwise furnished by the Government (such as feeding the Nation's troops in Iraq), they are providing services "to" the Government under enforceable contracts, but ISDA contractors operating Government clinics or hospitals do so "as" the Government under unenforceable contracts (US Br. 25); in truth, both are providing services to and for the Government that the Government otherwise would perform itself. And while the Government now argues that an ISDA contractor "does not thereby undertake to supply a fixed quantity of service in exchange for a negotiated price," *id.* 24, plainly that is not so: both contractors here were *required by contract* to op-

erate the Secretary's hospitals and clinics on their reservations for the specified year, and at a specified negotiated price that included CSCs.

Had the Hospital Corporation of America been awarded these same contracts, the Government would never dare argue they were unenforceable at the stated contract price. US Br. 24 (IHS "procurement contractors" do fare better); *but see*, NCAI Br. 11 n.9; S. Rep. No. 100-274, at 13 (criticizing IHS for treating ISDA contractors differently than "private suppliers of goods and services"). Yet here, the Government insists the parties are mere "partners" (US Br. 23), albeit lopsided partners, where the Secretary, alone, chooses how much he will contribute. In the end, it is not the nature of the contract terms, but the identity of the contractor–an Indian Tribe–that is the only remaining distinction supporting the Government's argument. But Indian Tribes are just as entitled to the protection of the law as any other contractor. As the Federal Circuit correctly observed, "[t]here is nothing in the ISDA to support the contention that the Secretary has wider latitude to breach his contracts with the Indian tribes than he has with other government contractors." *Thompson*, Pet. 17a n.5.

B. The Government's Reading of § 450j-1(b) Is At War With The Plain Language and Purpose Of The Act.

The second sentence of § 450j-1(b) provides in pertinent part that "the provision of funds under this [Act] is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this [Act]." The Solicitor General would take these two straightforward limitations on the ISDA's contract funding mandates and transform them into an unspoken congressional grant of power to the Secretary to allocate his mid-1990s lump-sum appropriations in whatever way he saw fit. That astounding proposition finds absolutely no support in the language, structure or history of the Act. Rather, § 450j-1(b) assures that *only* Congress, acting through

annual Appropriations Acts, can alter the Secretary's duty to pay ISDA contracts at the full amounts required by that Act, unless the Secretary clearly demonstrates that doing so is not possible without reducing funding for pre-existing programs serving other Tribes.

The Government offers no support for its claim that the availability clause in the ISDA means something other than what this established term of art means everywhere else in appropriations law: an assurance that the amounts mandated in an authorizing act and identified in a contract are only obligated upon enactment of appropriations legally available to pay those amounts in full. To construe that clause instead as an unprecedented grant of discretion *not* to pay these contractors more than the Secretary chose to budget and spend–even in years when Congress annually increased IHS's available appropriations by up to $88 million (Tr. Br. 11)–is counterintuitive, contrary to appropriations law and unsupported in the statutory text.

Similarly ill-conceived is the Government's interpretation of the condition that, in paying a contractor, "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe." The Government errs in redefining "to reduce funding" to mean, not a reduction from the amounts previously spent, but a reduction from the higher amounts the Secretary each new year chose to budget and spend. And the Government errs in redefining "programs, projects, or activities serving a tribe" to mean not only actual service programs, but also the entire bloated IHS bureaucracy for which the Secretary annually set aside over a quarter billion dollars. JA 525, 542, 562. The Secretary's proposition that his budgeting and spending power at all levels of the agency is sufficient to nullify ISDA contracts is an affront to the plain language and purpose of the Act.

The availability clause. The Government's approach to the availability clause reflects the misconception that Congress reserved to the Secretary the same discretion over fund-

ing matters he would have had under the "lump-sum rule" of *Lincoln* had the ISDA never been enacted. But there is nothing to anchor that remarkable proposition.

Hornbook appropriations law instructs that the "objective of [availability] clauses is compliance with the Antideficiency Act." U.S. General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW at 6-28 (2d ed. 1992); Tr. Br. 26-27; CoC Br. 20-22, so that when an agency signs a contract before an appropriation, it does not create an obligation in excess of amounts legally available out of that later appropriation. 31 U.S.C. 1341(a)(1). As reflected in the *Ferris-Blackhawk* rule, this condition means that contract obligations must be paid *first* out of a legally available lump-sum appropriation, only after which the Secretary retains discretion over how to spend the balance. Tr. Br. 31-32. The Government by omission concedes the Secretary's conduct violated this well-settled law (*supra* 1), and the *only* asserted basis for distinguishing the *Ferris-Blackhawk* rule is patently wrong: an IHS ISDA contractor is in no better position than an IHS procurement contractor to be "charged with knowledge" about the Secretary's daily spending decisions, US Br. 24.

The Secretary nonetheless argues that when Congress used the well-established term of art "subject to the availability of appropriations," it actually meant to include the Secretary's internal "intervening allocation" (US Br. 39). In other words, according to the Secretary, he cannot pay more of a stated contract amount than is legally available, but he can freely pay *less*–even when his appropriations increase $88 million (Tr. Br. 11). The Secretary offers no legal support for the radical proposition that an established term of art ought not to be given its ordinary meaning, but instead be read in light of the agency's choices about how to use its appropriation.

Nor can the phrase "provision of funds" reasonably be stretched as far as the Government would take it (US Br. 41). That phrase simply addresses the "expenditure" of funds, 31 U.S.C. 1341(a)(1)(A)–literally, the payment of money–not

some unprecedented "grant of authority to the Secretary to adjust funding levels" (US Br. 41). Congress and agencies routinely use the "availability" clause as a limit on a duty to pay found elsewhere in an authorizing act,[4] not as a grant of discretion *not* to pay. "[F]amiliar statutory language" should not be given "a meaning foreign to every other context in which it is used." *Jones v. R.R. Donnelley & Sons Co.*, 124 S.Ct. 1836, 1845 (2004).[5]

The Secretary's reading of the availability clause is diametrically opposed to the constraints in Secretarial discretion Congress imposed in the Amendments, and is foreclosed by the mandate that the Act's provisions "shall be liberally construed for the benefit of the Contractor." § 450*l*(c)(sec. 1(a)(2)). For the same reason, the Government reads too much into Congress's repetition of the availability clause in the 2000 Amendments (US Br. 43): if Congress is presumed to have approved anything, surely it would be the universal decisions at that point *rejecting* the Secretary's position in the context of lump-sum appropriations (Tr. Br. 17-18, citing cases). *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) ("well-settled presumption that Congress understands the state of existing law when it legislates").[6]

---

[4] *E.g.*, 15 U.S.C. 636(m)(7)(B)(i); 16 U.S.C. 5608(b); 20 U.S.C. 4357(b)(2); 25 U.S.C. 640d-27(a); 29 U.S.C. 1907(b)(2); 29 U.S.C. 3012(b)(3)(B); 42 U.S.C. 13921(a)(3); 46 U.S.C. 53106(a)(1); 48 C.F.R. 52.232-18; *infra*, 1a-2a.

[5] The Secretary's misconstruction would override the ISDA's funding mandates, §§ 450j-1(a), (g), the anti-reduction prohibitions, § 450j-1(b), and even the reduction clause, for it would make no sense for Congress to command payments, prohibit reductions, and specially address programs serving other Tribes if it intended all along to grant the Secretary complete discretion whether to pay. (The hypothetical bind from a *reduced* appropriation (US Br. 39) is easily answered by uncited § 450j-1(b)(2)(A), authorizing contract reductions when appropriations fall.)

[6] Respecting the plain meaning of the 1988 availability clause does not produce redundancy with a different 1975 "availability" clause (US Br. 40-41). The latter clause (§ 450j(c)) is directed to the future years of the unique *multi-year* contracts authorized in § 450j(c) (not the *annual* con-

The Government's search into legislative history to support its broad interpretation of this clause is similarly unavailing, for the availability clause has *no* legislative history. This routine term of art was added by the bill's floor manager Representative Udall immediately prior to passage, accompanied by an explanation of the bill's "more important changes" that made no mention of the clause. 134 Cong. Rec. 23340 (1988). Surely "an amendment which would work such an alteration to the basic thrust of the draft bill . . . would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill," *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17-18 (1987); *see also Train v. City of New York*, 420 U.S. 35, 45-46 (1975) (rejecting theory Congress "at the last minute scuttled the entire effort"). The Government's effort (US Br. 42) to infer "apparent" congressional intent from a BIA letter offering no explanation (along with more remote writings) only underscores the danger of searching the "entrails of legislative history" for whatever support one's theory might find. *Int'l Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984).[7]

tracts involved here). It reflects the time-honored rule of *Bradley v. United States*, 98 U.S. 104 (1878), and *Leiter v. United States*, 271 U.S. 204 (1926), that absent a special statutory right, the 'out' years of multi-year contracts do not create contract obligations. H.R. Rep. No. 93-1600, at 29 (1974) (explaining need for clause); *cf.*, 48 C.F.R. 32.705-1(b).

Nor is the Secretary's expansive view of the availability clause supported by the "deficiency in funds" component of the Act's mandatory Secretarial reports (US Br. 42, citing § 450j-1(c)(2)), reports, incidentally, the Secretary never made (NCAI Br. 27). This provision reflects the possibility that later Congresses might cap CSCs in future Appropriations Acts, and Congress wanted to know of any resulting shortfalls. There is nothing inconsistent between Congress's desire to track all aspects of contract funding, including shortfalls in cap years, and its judgment that the Secretary's duty to pay is fixed by the legal availability of appropriations.

[7] The Secretary's brief also mangles other principles of appropriations law. The Secretary disregards Congress's selective use elsewhere (but not in these cases) of the term of art "not to exceed" (US Br. 45), casting aside the principle that Congress is presumed to mean what it actually says, Tr. Br. 26. Similarly, the Secretary (1) mislabels a committee recommendation as an "earmark" (US Br. 11); (2) omits the words "transitional" and "shall *remain* available" to alter the meaning of the "ISD Fund" (*id.* 42-43); (3) creates a new presumption that Congress knows what an agency is doing (*id.* 43 n.17); and (4) disregards the term "initial or expanded" in the ISD Fund. This last error permits the Secretary to recharacterize the Cherokee Nation's FY1996 "ongoing" CSC underpayment as an initial underpayment (*id.* 15 n.9), even though the Stilwell and Sallisaw portions of that AFA had been initially contracted 2 to 4 years earlier (Tr. Br. 14). Likewise, the Shoshone-Paiute FY1997 AFA underpayment was for an "ongoing" activity first awarded as an initial AFA in FY1996, *id.* 16. *See, e.g.*, 68 Fed. Reg. 37511 (Jun. 24, 2003); 62 Fed. Reg. 1468 (Jan. 10, 1997) (explaining "ongoing"). Throughout, the Secretary simply ignores his own concessions elsewhere that the plain effect of the ISD Fund was to give the agency flexibility to fund transitional costs in the following year, not to cut off funds due and payable in the current year, Tr. Br. 37.

The reduction clause. Section 450j-1(b) also directs that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this [Act]." The plain meaning of this provision is that the Secretary could, but did not have to, reallocate spending from one Tribe to another. Tr. Br. 45. From this limited exception to reprogramming, and in order to protect his bureaucracy, the Secretary reaches the broad conclusion that the ISDA left *no* appropriations available to pay the Tribes. The Government reaches this unconvincing position by arguing that (1) funding for inherent (*i.e.*, noncontractable) federal functions cannot be reprogrammed to pay ISDA contract costs (including CSCs) and (2) funding for contractable administrative functions cannot be reprogrammed either, because those are "programs, projects, or activities serving a tribe." US Br. 28-29. Its arguments have no basis in the Act and are belied by the facts.

The Government is correct that inherent federal functions by definition cannot be contracted to the Tribes, but that is not at issue here. Never have the Tribes sought to contract the administration of the Secretary's "inherent federal functions," and nothing in the Federal Circuit's decision suggests they could. By definition, the reprogramming action man-

dated by established federal contract law (Tr. Br. 31-32) is not an assignment of a function to the contractor, but a reprogramming of money away from something the agency is doing and will continue to do (albeit with a little less money). Nothing in the ISDA bars reprogramming funding for those functions in order to meet the Secretary's contract obligations; just because a function is not contractable does not mean the amount of spending on it, which is wholly within the Secretary's discretion, is necessary or efficient or can never be reduced.

The text of the ISDA's anti-reduction provisions proves the point. Sections 450j-1(b)(1), (3) & (4) prohibit the Secretary from reducing contract amounts to pay for various "Federal functions" like "administration by the Secretary" and "contract monitoring." As a matter of plain language, this categorical requirement prohibits the Secretary from sacrificing ISDA contract obligations in favor of spending on "Federal functions," with no exception for federal functions that are inherent. Indeed, these sections twice declare that funding for "contract monitoring"–which the Government insists is an inherent function (US Br. 34)–"shall not" take precedence over funding an ISDA contract. Plainly these measures *do* "appl[y] to funds retained by the Secretary to pay for inherent federal functions," *id.*, and the Government's attempt to wriggle free from this provision misstates the Act. The Government claims that subsection (b)'s protection for "[t]he amount of funds required by subsection (a)" covers "only 'those administrative functions that are *otherwise contractable*,'" (*id.*, quoting subpar. (a)(1)), but not CSCs. That is demonstrably wrong: by its terms subsection (b) protects all "subsection (a)" contract amounts, including the CSCs required by subpar. (a)(2). Thus, *nothing* in subsection (b) says spending on "Federal functions" as a whole (contractable or not) cannot be reduced to pay contract obligations, be they CSCs or the Secretarial amount.

With no textual support, the Government is left arguing that § 450j-1(b) must not be read to "strip IHS of the ability to perform those functions[ ] which are critical to the existence and integrity of the very contracting process the Tribes have invoked," *id.* 35, or further, to jeopardize the very existence of the IHS, *id.* 19. This is hyperbole. This provision simply limits the power of the Secretary to engage in discretionary spending on his bureaucracy at the expense of the Tribes. Indeed, in FY1994-96 the Secretary boosted his total Headquarters and Area Office spending on inherent federal functions (his so-called "residual") by 41% from $25.6 to $36 million, more than enough to pay the CSCs at issue here.[8] JA 525, 542, 562. The impression the Government gives that spending on inherent federal functions was fixed and irreducible is thus untrue, and the Secretary does not even attempt to show why, in order to meet his contract obligations here, he could not have forgone a fraction of the $10.4 million increase he chose to make.

The Secretary's specter of ISDA contract payments absorbing the entire IHS budget is speculative, to say the least. Although dealing a blow to IHS's other spending would not demonstrate a flaw in the ISDA (Tr. Br. 46-47), certainly no such issue arose in FY1994-97, when Congress annually boosted IHS appropriations by up to $88 million and the agency ended each year with up to $98 million in unspent balances. *Id.* 11-12. Even if the Secretary *had* determined that funding for his inherent functions could not be reduced, his total budgeted spending on federal functions as a whole

[8] The Government never mentions the relatively small annual underpayments at issue here (between one and two million dollars as compared to the Secretary's one-quarter billion administration), electing to feature only total underpayments to all contractors. But this is not a class action, as the district court in *Cherokee* made plain in a ruling that makes future class actions problematic (199 F.R.D. 357). It is a direct action by only two contractors, continuing years after the limitations period has expired for similar claims by other Tribes and long after Congress has foreclosed later claims by capping the annual appropriations. Tr. Br. 12.

(contractable or not) was *over a quarter billion dollars*. The idea that he could not reprogram a tiny fraction of this bureaucracy to pay his contract obligations to the Tribes without impairing critical "inherent" functions is ludicrous.

The Government seeks to immunize the Secretary's discretionary spending of IHS's available quarter-billion dollar appropriation by another interpretive sleight of hand: the misuse of "tribal shares." It insists that everything the Secretary allocated for spending on federal functions that were *not* "inherent" was for "programs, projects, or activities serving a tribe" that need not be reduced. This interpretation is wrong on multiple counts. First, it is contrary to the plain wording of the reduction clause, which only protects the level of funding for ongoing programs serving other Tribes *before* additional funds (including general appropriation increases) become available. Funding is not "reduced" when the Secretary is forced to spend less of an increase on a discretionary item than he had budgeted. Second, the reduction clause protects, not "tribal shares" or "administrative functions," but actual "programs serving [another] tribe" (or, as the Secretary puts it (US Br. 28), "direct program funding for delivery of services at local service units"). 59 Fed. Reg. 3166, 3168 (Jan. 20, 1994) ("programs" for tribes are "'generally performed at the reservation level'"). Stretching the Act's plain meaning to place off limits the $216 to $250 million the Secretary annually designated as Area and Headquarters "tribal shares" in support of his bureaucracy (JA 525, 542, 562) is utterly unsupported in the statutory text. In the Government's world, even if Congress had tripled IHS's budget each year the Secretary would still be authorized to pay these claimants nothing by the simple expedient of reclassifying all other funds as "tribal shares" or "residual."[9]

[9] The Secretary points to evidence that by 1999 he did in fact reduce spending on the non-"inherent" part of the IHS bureaucracy (US Br. 36), as (1) "reductions [were made] due to cuts in administrative funding," S. Rep. No. 106-221, at 2 (1999), and (2) responsibilities for health facilities were shifted to tribal contractors, *id.* But there is no evidence that in the earlier years at issue here more cuts could not have been made, or explanation why the Secretary failed in those years to apply a fraction of those freed-up monies to pay *any* of his contract obligations, instead of boosting spending on inherent federal functions by 41%.

The only relevant question is how much did the Secretary actually spend on ongoing programs serving other Tribes. The Secretary's failure to answer that question directly, notwithstanding his undenied burden, is understandable given that the record proof (even without discovery) showed large portions of administrative funds were never spent on programs serving Tribes (Tr. Br. 48). Avoiding these facts, the Secretary shifts to yet another new theory, trying to draw a direct connection between funding for "programs, projects, and *activities* serving a tribe" (the reduction clause) and funding for the Secretary's "administrative *activities*" (mentioned in § 450f(a)(1)). US Br. 28-29. But to do this requires omitting the key modifier "administrative," permitting the Secretary to blur the unmistakable line Congress drew between funding for activities actually "serving a tribe," and the Secretary's administrative functions whose funding cannot be a basis for reducing a contract, *see* § 450j-1(b)(1) (contract amounts "shall not be reduced to make funding available for . . . administration by the Secretary"). The Government's reading would cut the words "serving a tribe" right out of the reduction clause, and also nullify § 450j-1(b)(3)'s reference to "Federal [employee] pay costs." More fundamentally, it would permit the Secretary to reduce contract payments, not to save another Tribe's hospital, but to save the Secretary's administrative staff.

Ultimately, the Secretary's arguments about the reduction clause unravel the ISDA. It is precisely because the Secretary prior to 1988 successfully asserted unreviewable authority to underfund ISDA contracts that Congress rewrote the Act, not once but twice. Tr. Br. 4-10. The Government's position here confirms the wisdom of those reforms, for the Secretary

has continued to prioritize everything else he does, including his residual and upper level bureaucracies, over his contractual duty to pay–even in years when Congress substantially boosted his appropriation, the Secretary boosted his own "residual," his own streamlining reforms freed up additional resources, and up to $98 million went unspent. While it is indisputably true that the pressures on IHS (as with other agencies) from insufficient funding are great, Congress prohibited the agency from using that fact as *carte blanche* to penalize the people served in contracted hospitals by underfunding the contracts and setting them up for failure–at least not when the Secretary cannot meet his undisputed burden to clearly demonstrate that fully paying them would compel a reduction in any ongoing program actually "serving a[nother] tribe."[10]

C. Section 314 Cannot Undo The Secretary's Breach.

Section 314 declares that the amounts recommended in the FY1994-FY1998 appropriations committee reports "are" now the total amounts available for CSC payments. The Federal Circuit held this rider cut off any additional payments from the unobligated balances still remaining from those five expired Appropriations Acts. The Government resists this plain meaning by arguing that it cannot be reconciled with later riders that borrow the same language. The Government then argues that the rider retroactively clarified the earlier Acts, switches to arguing it retroactively changed them, and finally

[10] The Government errs in arguing that the portion of the considerable annual leftover balances (Tr. Br. 12) associated with "collections"could not be used for CSCs (US Br. 37 n.14). *All* these collections could have been spent on hospital and clinic overhead costs (*i.e.*, CSCs), because payments for such costs are "for the facilities, and to carry out the programs . . . to provide health care services to Indians," 25 U.S.C. 1621f(a), and are "necessary [for such facilities] to achieve compliance" with applicable accreditation requirements, 42 U.S.C. 1395qq(c) (Medicare); 25 U.S.C. 1642(a) (Medicaid). Indeed, it is the failure to pay these very costs that nearly led to the loss of the Owyhee Hospital's accreditation, *supra* 4 n.3. But noticeably, even the Government is not categorical, asserting only that these unspent balances of up to $98 million "*may* include funds that could not be used for CSCs." US Br. 37 n.14 (emph. added).

argues that it retroactively authorized the Secretary's earlier unauthorized acts. None of these contentions is correct.

The Government appears to recognize that, on its face, § 314 could be read as an accounting measure targeted at the current expenditure of the unobligated balances remaining from the five earlier Appropriations Acts, given that the rider's five year look-back provision matches the five-year availability of the expired appropriations accounts. US Br. 47, citing 31 U.S.C. 1552(a). That is how the Federal Circuit read it. Pet. App. 29a. To counter this reading, the Government points to later versions of the rider that reach back more than five years, from which it concludes that the original rider must not have been focused on the unobligated balances after all. That is a stretch. First, the issue presented here is § 314, not the later riders (US Br. I). Second, the five-year rule for charging expired appropriations does *not* bar charging a current account for an obligation that is *older* than five years. 31 U.S.C. 1553(b)(1). Thus, the Government's only textual basis for rejecting the Federal Circuit's plain meaning interpretation collapses.[11]

The Government's contrary interpretation is self-contradictory. The Government argues that § 314 "changed existing law by clarifying the total amounts available for CSCs in the specified years" (US Br. 21). But a clarification is not a change, and the Government cannot have it both ways. If § 314 is a "change" to the prior Appropriations Acts, it means appropriations were available under prior law at the time of those Acts, the Tribes' contract rights vested, and the Tribes win. If § 314 is a "clarification" of what appropriations were

[11] The equally troubling issue the Government never confronts is why, if Congress in § 314 intended retroactively to clarify or amend the earlier Appropriations Acts, it was necessary each year to reenact it at all; on its face, the reenactment of the rider implies the rider was not permanent, but only a one-year measure directed at the remaining unobligated balances. It makes no sense to contend (as the Secretary must) that § 314 clarified or amended the earlier Appropriations Acts, but only for the year, after which the unamended laws would pop back up absent another rider.

"available" from the prior Appropriations Acts, then the Government is prescribing a rule of decision to the courts in adjudicating rights under past law. Either way, as retroactive legislation aimed at the Tribes' long-before vested contract rights, § 314 violates *Winstar* and *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

The Government wrongly invokes *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) to argue that § 314 retroactively "clarified" that additional funds from the earlier appropriations were never legally available. Nothing in the text indicates an attempt at retroactive clarification; § 314 does not speak in the past tense; and § 314 does not meet the other criteria for a "clarification." Tr. Br. 38-40; *INS v. St. Cyr*, 533 U.S. 289, 315-17 (2001) (noting heavy presumption against retroactivity). Even if it did, *Red Lion* would be inapposite. *Red Lion* deals with situations where Congress adds new prospective legislation that is premised on an agency's prior construction of a statute, where the subsequent legislation ratifies the consistency of that construction with the existing statute, 395 U.S. at 380-83; it does not grant Congress license to define the meaning of past law into what it otherwise would not be in order to dictate the outcome of pending litigation over contracts to which the Government is a party. Moreover, even if Congress did attempt a mere clarification of existing law, this Court would not be bound, for "a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996).

In the end, even the Government does not believe that if § 314 is retroactive, it merely "clarified" pre-existing law and "ratified" the Secretary's earlier understanding. The Government concedes that under the law as it existed in 1994 the Secretary was not "*prohibited*" from paying CSCs in full (US Br. 45), yet asserts that after § 314 the Secretary became retroactively "prohibited" from paying them. How a shift from a permissive measure to a mandatory measure does not work a *change* in law is never explained. A statute cannot at one

time ratify an agency's interpretation of a law and make that interpretation no longer the law.

Eventually the Government is left to argue that § 314 retroactively amended and "'changed'" pre-existing law (US Br. 48). If that is what Congress purported to do, it crossed the lines this Court drew in *Winstar* and *Klein*. Tr. Br. 40-41. Under the former, Congress simply lacks any "sovereign power" to alter the rights of those with whom the Government contracts. *Winstar*, 518 U.S. at 879 n.22 ("The Government could not, for example, abrogate one of its contracts by a statute abrogating the legal enforceability of that contract, Government contracts of a class including that one, or simply all Government contracts"). Although Congress can legislate retroactively, in doing so it cannot "destroy vested rights," *Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 856 (1990) (Scalia, J. concurring). Inexplicably, the Government never responds to this fundamental difficulty with its position. If a contract subject only to the availability of appropriations confers no vested rights when appropriations become available, over a century of government contract law has been turned on its head. Tr. Br. 25-30; CoC Br. 5-12. But if that is *not* correct, and contract rights did vest, then § 314, as construed by the Government, is invalid. This Court in *Winstar* declined to protect the Government in circumstances involving a much closer call; there is no reason for a different outcome here.[12]

Equally troubling is that if § 314 is construed as a targeted congressional response to successful ongoing litigation to vindicate private rights against the Government for money damages, then the rider amounts to an instruction to the

[12] In *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986), the Social Security Act did not create contract rights, and the Government reserved in the agreement the power to amend prospectively both the agreement and the SSA provisions it implemented. Even so, in discussing contracts this Court cautioned that "sovereign power" does not include "the power [of Congress] to repudiate its own debts . . . simply in order to save money." *Id.* 55.

courts to alter their rulings and construe the earlier Appropriations Acts in the Government's favor. That is precisely the kind of action Congress cannot take when the issue involves private contract rights, precisely as was the case in *Klein* (involving congressional interference in a private right of action arising from a Presidential pardon). *See The Clinton Bridge*, 77 U.S. (10 Wall.) 454, 463 (1870) (noting Congress could not pass a law requiring a rule of decision be applied to a pending case involving a "private right of action"); *Biodiversity Assoc. v. Cables*, 357 F.3d 1152, 1170-71 (10th Cir. 2004) (contrasting *Klein*'s application to "private rights" and a "private right of action" for "money damages" with cases involving injunctions and "public rights"). The Government errs in relying on *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429 (1992), for *Robertson* involved a statutory amendment that removed the basis for an injunction to enforce prospectively a public right granted under the statute. It did not involve private rights to money damages against the Government under expired laws that have no current life, nor a rider targeted narrowly at those damage claims only. Fortunately, the Federal Circuit's reading of § 314 avoids the need to consider any potential constitutional tension under *Klein*.[13]

CONCLUSION

For the foregoing reasons, the judgment of the Federal Circuit in No. 03-853 should be affirmed and the judgment of the Tenth Circuit in No. 02-1472 should be reversed.

[13] This Court's tariffs jurisprudence has nothing to do with this case (US Br. 48-49). It is one thing for Congress to ratify an agency's authority to impose tariffs, and quite another to alter the meaning of expired Appropriations Acts and 'ratify' the Government's own breach of contract. "[A] distinction must be taken 'between a bare attempt of the Legislature retroactively to create liabilities for transactions . . . fully consummated in the past . . . and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice'" and "impairs no substantial right"). *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 302 (1937).

Respectfully submitted,

CARTER G. PHILLIPS
STEPHEN B. KINNAIRD
HOWARD J. STANISLAWSKI
SIDLEY, AUSTIN, BROWN & WOOD, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

* Counsel of Record

LLOYD B. MILLER *
ARTHUR LAZARUS, JR., PC
HARRY R. SACHSE
WILLIAM R. PERRY
MELANIE B. OSBORNE
AARON M. SCHUTT
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240

Counsel for Cherokee Nation and Shoshone-Paiute Tribes

APPENDIX A

SAMPLING OF STATUTES CONDITIONING AGENCY DUTY TO PAY ON THE "AVAILABILITY OF APPROPRIATIONS"

1. 15 U.S.C. § 636(m)(7)(B)(i) ("Subject to the availability of appropriations, of the total amount of new loan funds made available for award under this subsection in each fiscal year, the Administration shall make available for award in each State (including the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, and American Samoa) an amount equal to the sum of (I) the lesser of—(aa) $800,000; or (bb) 1/55 of the total amount of new loan funds made available for award under this subsection for that fiscal year; and (II) any additional amount, as determined by the Administration.")

2. 16 U.S.C. § 5608(b) ("The Secretary of State shall, subject to the availability of appropriations, pay all necessary travel and other expenses of persons described in subsection (a)(1) of this section and of not more than six experts and advisers authorized under section 5601(e) of this title with respect to their actual performance of their official duties pursuant to this chapter, in accordance with the Federal Travel Regulations and sections 5701, 5702, 5704 through 5708, and 5731 of Title 5.")

3. 20 U.S.C. § 4357(b)(2) ("Subject to the availability of appropriations, the Secretary shall make payments to each Federal endowment fund in amounts equal to sums contributed to the fund from non-Federal sources during the fiscal year in which the appropriations are made available (excluding transfers from other endowment funds of the institution involved).")

4. 25 U.S.C. § 640d-27(a) ("In any litigation or court action between or among the Hopi Tribe, the Navajo Tribe and the United States or any of its officials, departments, agencies, or instrumentalities, arising out of the interpretation or implementation of this subchapter, as amended, the Secretary shall pay, subject to the availability of appropriations, attorney's fees, costs and expenses as determined by the Secretary to be reasonable.")

5. 29 U.S.C. § 1907(b)(2) ("Subject to the availability of appropriations, the Secretary shall make payments to the Endowment Fund in amounts equal to sums contributed to the Endowment Fund from non-Federal sources (excluding transfers from other endowment funds of the Center).")

6. 29 U.S.C. § 3012(b)(3)(B) ("Subject to the availability of appropriations to carry out this section, the allotment to any system under subparagraph (A) shall be not less than $50,000, and the allotment to any system under this paragraph for any fiscal year that is less than $50,000 shall be increased to $50,000.")

7. 42 U.S.C. § 13921(a)(3) ("The Attorney General shall make available not less than $800,000 per project, subject to the availability of appropriations, and such funds shall be allocated—(A) 50 percent to the affected State and local law enforcement and prevention organizations participating in such projects; and (B) 50 percent to the Bureau of Alcohol, Tobacco, Firearms, and Explosives, Department of Justice for salaries, expenses, and associated administrative costs for operating and overseeing such projects.")

8. 46 U.S.C. § 53106(a)(1) ("The Secretary, subject to the availability of appropriations and the other provisions of this section, shall pay to the contractor for an operating agreement, for each vessel that is covered by the operating agreement, an amount equal to—(A) $2,600,000 for each of fiscal years 2006, 2007, and 2008; (B) $2,900,000, for each of fiscal years 2009, 2010, and 2011; and (C) $3,100,000 for each fiscal years 2012, 2013, 2014, and 2015.")

(9) (7)

Nos. 02-1472 & 03-853

Supreme Court, U.S.
FILED
JUN 18 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

TOMMY G. THOMPSON,
Secretary of Health and Human Services, *et al.*,
Respondents.

TOMMY G. THOMPSON,
Secretary of Health and Human Services,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth Circuit and for the Federal Circuit

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, AND THE AEROSPACE INDUSTRIES ASSOCIATION IN SUPPORT OF THE CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES

HERBERT L. FENSTER
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 496-7500

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

IAN HEATH GERSHENGORN *
DONALD B. VERRILLI, JR.
DAVID A. CHURCHILL
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

* *Counsel of Record*

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Once A Contract Is Properly Awarded, The Government Cannot Avoid Its Financial Obligation Under That Contract By Exhausting The General Lump-Sum Appropriation Account From Which The Obligation Is To Be Paid 5

A. The Government's Position Is Contrary To More Than 120 Years Of Settled Law 5

B. The Government's Position Would Be Devastating To Government Contractors And The Government Alike And Is Flatly Contrary To Congressional Intent 12

1. The government's position would render many government contracts illusory, leaving contractors in an untenable position and undermining the government's ability to contract 12

2. The Antideficiency Act does not support the government's position 15

3. The fact that the contracts are "subject to the availability of appropriations" does not support the government's position 19

TABLE OF CONTENTS - continued

II. Congress Cannot Limit Retroactively The Government's Contract Liability After That Liability Is Fixed 24

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539 (Ct. Cl. 1980) 27

Bradley v. United States, 98 U.S. 104 (1878) 10

City of Detroit v. Detroit Citizens' Street Railway Co., 184 U.S. 368 (1902) 13

Corliss Steam-Engine Co. v. United States, 10 Ct. Cl. 494 (1874), *aff'd*, 91 U.S. 321 (1875) 24

Delta Data Systems Corp. v. Webster, 744 F.2d 197 (D.C. Cir. 1984) 9

Department of Revenue v. ACF Industries, Inc., 510 U.S. 332 (1994) 18, 19

Diamond v. Chakrabarty, 447 U.S. 303 (1980) 17

Dougherty v. United States, 18 Ct. Cl. 496 (1883) 7, 8, 11, 15

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 17

Ferris v. United States, 27 Ct. Cl. 542 (1892) 6, 7

Franconia Associates v. United States, 536 U.S. 129 (2002) 13, 24

Gibney v. United States, 114 Ct. Cl. 38 (1949) 23

Jones v. R. R. Donnelley & Sons Co., 124 S. Ct. 1836 (2004) 18

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 18

Lincoln v. Vigil, 508 U.S. 182 (1993) 9

TABLE OF AUTHORITIES - continued

Lynch v. United States, 292 U.S. 571 (1934)..... 14, 25

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)..... 17

Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000) 23, 24

Murray v. City of Charleston, 96 U.S. 432 (1878) 13

New Jersey v. Yard, 95 U.S. 104 (1877)..... 13

New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966) 8, 23

New York Central & Hudson River Railroad v. United States, 21 Ct. Cl. 468 (1886)..... 8

New York Central Railroad Co. v. United States, 65 Ct. Cl. 115 (1928), *aff'd*, 279 U.S. 73 (1929)..... 8

Office of Personnel Management v. Richmond, 496 U.S. 414 (1990)..... 11

Perry v. United States, 294 U.S. 330 (1935)..... 26

Seatrain Lines, Inc. v. United States, 99 Ct. Cl. 272 (1943)..... 27

Shipman v. United States, 18 Ct. Cl. 138 (1883)..... 11

South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982)..... 6

Sutton v. United States, 256 U.S. 575 (1921) 10

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981)..... 17

United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, 484 U.S. 365 (1988) 18

TABLE OF AUTHORITIES - continued

United States v. Langston, 118 U.S. 389 (1886)..... 9, 10

United States v. Winstar Corp., 518 U.S. 839 (1996)..... 5, 14, 23, 26

STATUTES AND REGULATIONS

25 U.S.C. § 450j-1(b)..... 19

31 U.S.C. § 1304..... 3

31 U.S.C. § 1341..... 2

31 U.S.C. § 1341(a)(1)(A) 6, 16

31 U.S.C. § 1341(a)(1)(B) 6, 16, 22

31 U.S.C. § 1342..... 18

48 C.F.R. § 31.203 15

48 C.F.R. § 32.702 21

48 C.F.R. § 32.703-2..... 12, 21

48 C.F.R. § 32.704(c)..... 18

48 C.F.R. § 32.705-1..... 19, 21

48 C.F.R. § 52.232-18..... 19

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998) 24, 25

COMPTROLLER GENERAL OPINIONS

21 Comp. Gen. 335 (1941)..... 22

21 Comp. Gen. 864 (1942)..... 20

28 Comp. Gen. 163 (1948)..... 22

38 Comp. Gen. 93 (1958)..... 22

TABLE OF AUTHORITIES - continued

39 Comp. Gen. 340 (1959)..... 19, 21

Comptroller General Letter to Senator Alan Cranston, 1990 WL 10007871 (Aug. 24, 1990) 22

MISCELLANEOUS

Herbert L. Fenster & Christian Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 Pub. Contr. L.J. 155 (1979)..... 8, 10, 14

2 United States General Accounting Office, *Principles of Federal Appropriations Law* (2d ed. 1992)..... 9, 11, 15, 18, 22

INTEREST OF *AMICI CURIAE*

Amici Curiae are the Chamber of Commerce of the United States of America ("the Chamber"), the National Defense Industrial Association ("NDIA"), and the Aerospace Industries Association ("AIA").[1]

The Chamber is the largest association of businesses, companies, and associations in the world, representing an underlying membership of more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. Many of the Chamber's members provide goods and services to the United States under military and civilian government contracts. The Chamber initiates and enters litigation involving issues of national concern to the American business community, and it regularly advocates its members' views in this Court and other appellate forums.

NDIA is a non-partisan, non-profit organization with a membership of more than 1,100 companies and 32,000 individuals, including some of the nation's largest defense contractors. NDIA members contract to provide a wide variety of goods and services to the government. NDIA thus has a specific interest in government policies and practices concerning the government's acquisition of goods and services and its fulfillment of its contractual obligations.

AIA is the premier aerospace industry trade association, representing the nation's major manufacturers of commercial, military, and business aircraft, helicopters, aircraft engines, missiles, spacecraft, materials, and related

---

[1] No one other than *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of Record for the parties consented to the filing of this brief, and letters of consent have been filed with the Clerk.

components and equipment. AIA represents the interests of its members to ensure that the U.S. aerospace industry remains preeminent in a changing global market.

The issues presented in this case could have profound implications for the members of the Chamber, NDIA, and AIA. The government here claims a right to be free from its contractual obligations whenever the contracting agency exhausts congressional appropriations prior to payment on a government contract, even when there were sufficient appropriations to make full payment at the time the contract was awarded. That claimed right – which would leave contractors at the mercy of the contracting agency for payment on many government contracts – is contrary to more than 120 years of consistent case law and would upset the settled expectations of government contractors.

Adopting the government's newly-minted arguments for absolute discretion to determine the scope of its contractual liability would impact the entire government contracting community. Because of the Antideficiency Act, 31 U.S.C. § 1341, virtually every contract with the government depends upon congressional appropriations for its validity, and virtually all contractors rely on congressional appropriations for payment in the usual course. Moreover, the specific language on which the government places a substantial portion of its argument – the language stating that a contract is "subject to the availability of appropriations" – is a staple of government contract law, appearing frequently in statutory schemes, procurement regulations, and government contracts.

Amici Curiae have a critical interest in ensuring that this Court reaffirm 120 years of case law and protect settled expectations regarding the government's responsibilities as a reliable contracting partner.

INTRODUCTION AND SUMMARY OF ARGUMENT

From a government contracting perspective, this is an easy case. For more than 120 years, it has been the law that if there are sufficient funds in a general lump-sum appropriation account at the time a government contract is *awarded*, then the contractor has a right to payment that cannot be defeated on the ground that, at the time payment is due, the appropriated funds have been exhausted. The critical question, then, for a contract that is "subject to the availability of appropriations" is whether there is a sufficient appropriation to pay the contract *when the contract is awarded*. If so, the contract is binding. If the contracting agency later exhausts the appropriation by spending the appropriated funds elsewhere, the agency may lack authority to make payments on the contract, but the United States must answer to the contractor in the United States Court of Federal Claims (or a board of contract appeals) in a breach of contract action. Payment of such claims is from the Judgment Fund. *See* 31 U.S.C. § 1304.

These settled principles control this case. The contracts at issue here were to be paid from a general lump-sum appropriation account that in all relevant years exceeded $1.6 billion – vastly more than the contracts at issue. Nevertheless, the government ultimately refused to make full payment on the contracts, claiming that, in light of other agency expenditures, there were insufficient funds to make full payment. In that circumstance, the contractors have a claim for breach of contract that is enforceable in the Court of Federal Claims.

The government takes on these principles directly. In its certiorari filings with this Court, the United States argues that when a contract to be paid from a general appropriation is "subject to the availability of appropriations," the

government has no liability to the contractor if the relevant agency exhausts its appropriation. *See, e.g.*, Petition of United States in No. 03-853 at 18 (criticizing Federal Circuit for holding that "[f]unds are 'available' . . . whenever the total lump-sum appropriation exceeds the amount obligated by the agency at the moment of appropriation, without regard for the needs of other programs or the agency's need to operate throughout the year"); United States Brief in Opposition in No. 02-1472 at 17 (defending the Tenth Circuit's decision on the ground that the term "availability" in the phrase "subject to the availability of appropriations" does not mean "*theoretical* [or] *legal* availability, the hypothetical moment after Congress enacts an appropriation, rather than practical availability. To the contrary, 'availability' should be read in a realistic fashion in view of competing claims and priorities"). As the government would have it, a contractor is at the mercy of the contracting agency for payment under an otherwise valid contract.

That argument strikes at the heart of the government's reliability as a contracting partner. By reserving to itself the right to spend down a general appropriation and thereby deprive contractors of their vested right to payment, the government renders many government contracts illusory, harming not only on contractors left without a remedy, but also the government's ability to contract in the future.

The government's argument is also fundamentally misguided. It ignores critical statutory distinctions between the government's authority to make a contract and the government's authority to make payment on a contract, and it conflates the authority of the contracting agency to make payment with the government's ultimate liability to the contractor for breach of contract.

Similarly unpersuasive is the argument that Congress has the power to extinguish a contractor's vested right to payment by passing legislation years after the contract is finished that retroactively eliminates the right to payment. That argument is flatly contrary to *United States v. Winstar Corp.*, 518 U.S. 839 (1996), and other decisions of this Court that deny Congress exactly that power.

This Court should thus reject the government's effort to evade settled contracting law and, as this Court has done repeatedly and as the Federal Circuit did below, should hold the government to its contractual obligations.

ARGUMENT

I. Once A Contract Is Properly Awarded, The Government Cannot Avoid Its Financial Obligation Under That Contract By Exhausting The General Lump-Sum Appropriation Account From Which The Obligation Is To Be Paid.

The government argues that an agency's exhaustion of its general lump-sum appropriation precludes a government contractor whose contract was to be paid out of that appropriation from obtaining relief at either the agency or the Court of Federal Claims. That argument is contrary to settled case law, would wreak havoc with the government contracting community, and cannot be squared with the text and clear intent of the relevant congressional legislation.

A. The Government's Position Is Contrary To More Than 120 Years Of Settled Law.

The United States seeks to rewrite fundamental principles of government contracting law. For more than 120 years, a contractor who is to be paid from a general lump-sum appropriation that is sufficient at the time the

contract is awarded does not lose the right to payment simply because the contracting agency later exhausts the relevant appropriation. In those circumstances, although the agency is generally barred by the Antideficiency Act from making payments to the contractor,[2] the government must still answer to the contractor in an action for breach of contract.

These settled principles form the core of the so-called "*Ferris* doctrine." *Ferris v. United States*, 27 Ct. Cl. 542 (1892), involved dredging services to be provided to the federal government pursuant to a contract that was funded under a general appropriation. The government eventually exhausted the appropriation, and the contractor was told to stop work. The contractor then sued the government for breach of contract.

In holding in favor of the contractor, the U.S. Court of Claims rejected the argument that the exhaustion of the appropriation account excused the government from liability.[3] To the contrary:

---

[2] The Antideficiency Act provides in relevant part that a federal employee may not

> **(A)** make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]
>
> **(B)** involve [the federal] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341(a)(1)(A), (B).

[3] The U.S. Court of Claims is a predecessor court to the U.S. Court of Appeals for the Federal Circuit, and decisions of the Court of Claims are binding on the Federal Circuit. *See South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc).

> A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation *per se* merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.

27 Ct. Cl. at 546.

The Court of Claims' decision in *Ferris* flowed directly from the decision nearly a decade earlier in *Dougherty v. United States*, 18 Ct. Cl. 496 (1883). In *Dougherty*, the contractor supplied beef to the government under a contract to be paid from a general appropriation account. The Commissioner of Indian Affairs later ordered additional beef under an "add-on" to the contract, and the contractor delivered the beef. The government then discovered that it had exhausted the relevant appropriation account, and it refused to pay.

When the contractor sued in the Court of Claims, the government defended on the ground that "the contract was void because the annual appropriation had, at the time of the purchase, been covered by other contracts." 18 Ct. Cl. at 503. The Court of Claims held in favor of the contractor, stating that "we have never held that persons contracting with the Government for partial service under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department." *Id.* Distinguishing between the

government's authority to make payments and the government's liability for breach of contract, the court stated that "[t]he statutory restraints in this respect apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government." *Id. See generally* Herbert L. Fenster & Christian Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 Pub. Contr. L.J. 155, 173-74 (1979).

Since *Ferris* and *Dougherty*, the Court of Claims has repeatedly held that agency exhaustion of a general appropriation account does not preclude a subsequent action by the contractor for breach of contract. *See, e.g., New York Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966) ("The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims."); *New York Cent. R.R. v. United States*, 65 Ct. Cl. 115, 128 (1928) ("One of the reasons assigned for the nonpayment is the lack of appropriation, and this may be a sufficient reason for the accounting officers or the Postmaster General if the appropriations for the period in question were exhausted. But it furnishes no reason why this court may not render its judgment for the amount due."), *aff'd*, 279 U.S. 73 (1929); *New York Cent. & Hudson River R.R. v. United States*, 21 Ct. Cl. 468, 473 (1886) ("It does not appear that the appropriations were insufficient to enable the Postmaster-General to fulfill this contract and all others made by him, if any, upon the same authority, and whether they were so or not was no concern of the claimant, provided the contract in question did not exceed the entire annual appropriation.").

The "expert opinion" of the General Accounting Office ("GAO") is to the same effect.[4] The GAO Redbook – the government's own comprehensive summary of federal funding law – notes that "it is settled that contractors paid from a general appropriation are not barred from recovering for breach of contract even though the appropriation is exhausted." 2 United States General Accounting Office, *Principles of Federal Appropriations Law* 6-18 (2d ed. 1992) ("GAO Redbook"). Thus, "[w]here a contractor is but one party out of several to be paid from a general appropriation, the contractor is under no obligation to know the status or condition of the appropriation account on the government's books. If the appropriation becomes exhausted, the Antideficiency Act may prevent the agency from making any further payments, but valid obligations will remain enforceable in the courts." GAO Redbook at 6-17.

Nothing in this Court's opinions is to the contrary. Although this Court has had few if any relevant cases addressing contracts to be paid from general appropriations, this Court has rejected the United States' extreme position that Congress' failure fully to appropriate funds inevitably caps the liability of the United States at the appropriated amount. In *United States v. Langston*, 118 U.S. 389 (1886), for example, the minister resident and general counsel to Haiti – then John M. Langston – was entitled to a salary of $7,500 a year. Congress nevertheless appropriated "for ministers resident and consuls general to Liberia, [Haiti],

---

[4] The opinions of the General Accounting Office, as expressed in Principles of Federal Appropriations Law ("GAO Redbook"), are not binding, but they do reflect an "expert opinion" that the courts should "prudently consider." *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984) (Scalia, J.); *see also Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (relying on GAO Redbook).

Switzerland, Denmark and Portugal, at $5,000 each, $25,000." *Id.* at 391 (internal quotation marks and citation omitted). Notwithstanding the limited appropriations, this Court held that Langston was entitled to the full $7,500.

Cases such as *Sutton v. United States*, 256 U.S. 575 (1921), and *Bradley v. United States*, 98 U.S. 104 (1878) are not to the contrary. *Sutton*, for example, involved a contract for work relating to a channel in Florida from Clearwater Harbor to Tampa Bay. When the contractor sought to recover amounts above those that had been specifically appropriated, the Court of Claims denied relief. This Court affirmed, concluding that the Secretary of War was "without power to make a contract binding the government to pay more than the amount appropriated," and "those dealing with him must be held to have notice of the limitations upon his authority." 256 U.S. at 579; *see also Bradley*, 98 U.S. at 114-17 (United States not liable for rent payments above amount specifically appropriated by Congress for that purpose).

But the issues presented in cases such as *Sutton* and *Bradley* differ in at least one critical respect from the issues presented here and in *Ferris* and *Dougherty*: *Sutton* and *Bradley* involved a specific line-item appropriation designated for a single contract or project, rather than (as was the case in *Ferris* and *Dougherty*) a general appropriation for a number of contracts. *See generally* Fenster & Volz, 11 Pub. Contr. L.J. at 167-74.

That distinction is critical. When a contract is funded by a specific line-item appropriation, the contractor can determine exactly what the government is obligated to pay and, because the contractor is the only one to be paid from the appropriation, can easily track the funds remaining in the appropriation. In contrast, when a contract is to be paid from

a general appropriation, the contractor cannot track government spending on all of the myriad activities to be funded from the account. As a practical matter, then, the contractor is powerless to know how much money remains in the relevant account. *See* GAO Redbook at 6-18 (noting that requiring contractor to know how much of an appropriation remains available for it at any given time "would place an unreasonable burden on the contractor").

Government contract jurisprudence sensibly reflects these differences. The Court of Claims and the Federal Circuit have long held that *Ferris* and *Dougherty* do not apply when there is a specific line-item appropriation, rather than a general lump-sum appropriation; indeed, that distinction is reflected in *Dougherty* itself. *See Dougherty*, 18 Ct. Cl. at 503 ("[W]hen one contract on its face assumes to provide for the execution of all the work authorized by an appropriation, the contractor is bound to know the amount of the appropriation, and cannot recover beyond it."); *see also Shipman v. United States*, 18 Ct. Cl. 138, 146-47 (1883) (amount appropriated in specific appropriation authorizing construction was the limit of contractor's recovery).

The GAO Redbook reflects this same distinction, noting that a contract that is funded from a specific line-item appropriation "is valid only up to the amount of the available appropriation. Exhaustion of the appropriation will generally bar any further recovery beyond that limit." GAO Redbook at 6-18.[5]

---

[5] Nothing in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) is to the contrary. In that case, Congress "appropriated no money for the payment of the benefits that respondent seeks." 496 U.S. at 424. Here, in contrast, Congress appropriated sufficient funds to make the required payments.

In short, settled law makes resolution of the government contract issues presented here straightforward. When a contract is to be funded from a general appropriation account and there are sufficient funds in that account to pay the contractor at the time the contract is awarded, the government's exhaustion of the appropriation may prevent payment to the contractor by the agency, but does not relieve the government of its liability on the contract.

B. The Government's Position Would Be Devastating To Government Contractors And The Government Alike And Is Flatly Contrary To Congressional Intent.

The government asks the Court to overturn this body of settled law. Doing so, however, would have grave consequences for contractors and the government alike, and cannot be squared with any sensible reading of the relevant statutes.

1. The government's position would render many government contracts illusory, leaving contractors in an untenable position and undermining the government's ability to contract.

At the outset, it is critical to understand the practical effect of the government's position. Under the government's view, when a contract to be funded from a general lump-sum appropriation contains a "subject to" clause – as many such government contracts do, *see* 48 C.F.R. § 32.703-2 (describing requirements for contracts conditioned upon availability of funds) – the contractor is obligated to perform the contract fully, yet bears the risk that the agency will for

---

Only the agency's failure to pay sufficiently close attention to its expenditures caused the shortfall.

whatever reason exhaust its general appropriation, leaving the contractor not only without payment but also without any legal remedy against the government. The contractor would be forced to rely, in other words, not on Congress' appropriations, but on the uncertain financial management of the agency.

Government contracts and statutory schemes authorizing such contracts cannot reasonably be construed to force a contractor to bear that risk. The government argues to the contrary, suggesting that Congress granted each contracting agency a unilateral option to pay or not as that agency sees fit. But the contracts resulting from such a scheme would be entirely illusory, and this Court has repeatedly rejected constructions that would render government contracts illusory. *See, e.g.*, *Franconia Assocs. v. United States*, 536 U.S. 129, 142 (2002) (rejecting government's interpretation of contracts established by statutory scheme when government's interpretation would render the government's obligation "meaningless" and would result in a contract that was "illusory"); *City of Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U.S. 368, 384 (1902) (rejecting as "hardly . . . credible" the city's suggestion that the fare rate agreed on with railroad company, which "amounted to a contract," would be "subject to change from time to time" at the city's pleasure); *Murray v. City of Charleston*, 96 U.S. 432, 445 (1878) (A government contract "should be regarded as an assurance that [a sovereign right to withhold payment] will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise is an absurdity"); *New Jersey v. Yard*, 95 U.S. 104, 116-17 (1877) (same).

In the world urged by the government, the private contractor would find itself in an untenable position. As noted, a contractor is powerless to track the agency spending

of a lump-sum appropriation. *See supra* pp. 10-11. The contractor thus could never know prior to performance whether or not the government would ultimately make payment. Given the size of many government contracts, the uncertainty (and inevitable lack of payment on at least some contracts) would be devastating for contractors; indeed, it is hard to see how a contractor could justify to its owners or shareholders contracting with the government.

The negative impact of the government's approach thus would not fall solely on the private contractors. Expanding the Government's ability to avoid its contractual obligations in the way the United States now proposes would, like the Government's position in *Winstar*, "produce the untoward result of compromising the Government's practical capacity to make contracts," *Winstar*, 518 U.S. at 884 (plurality opinion), and have "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." 518 U.S. at 884; *see also Lynch v. United States*, 292 U.S. 571, 580 (1934) (Brandeis, J.) ("Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors"). The net result is that the government would undermine its "own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *Winstar*, 518 U.S. at 883; *see also id.* at 913 (Breyer, J., concurring) (limiting ability of United States to avoid contractual obligations is appropriate because "in practical terms it ensures that the government is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting").

Nor is that the only burden that the government's argument would place on contracting agencies. Requiring a

contractor to track government spending – and requiring that the government permit the contractor to do so – would surely constitute "a nuisance for the government as well." GAO Redbook at 6-18; *see also Dougherty*, 18 Ct. Cl. at 503 (noting that requiring the contractor to "know the condition of the appropriation account at the Treasury or on the contract book of the Department" might well "block the wheels of the Government").

An additional problem arises with respect to integrated contracts in which performance of fully funded work is not easily segregated from unfunded work. Consider, for example, a contract in which indirect costs are calculated as a fixed percentage of direct costs (as is often the case, *see, e.g.*, 48 C.F.R. § 31.203). In that situation, a contractor cannot incur direct costs without also incurring indirect costs. If funding for the indirect costs is put in doubt (because, for example, the agency is threatening to exhaust its appropriation), the contractor cannot simply stop work on the "indirect cost portion" of the contract. The effect of the government's approach, therefore, would be to require the contractor to stop work on the entire contract. *See, e.g.*, Fenster & Volz, 11 Pub. Contract L.J. at 179-80 (describing and illustrating the problem of applying the government's approach to integrated contracts).

2. The Antideficiency Act does not support the government's position.

Unsurprisingly, given this precedent and these myriad practical problems, nothing in the Antideficiency Act compels the government's implausible position. Indeed, the government's position is precisely contrary to congressional intent, because the approach articulated by the Court of Claims and GAO is fully consistent with, and flows directly from, that Act.

The Antideficiency Act was passed by Congress to rein in spending by the Executive Branch. The Act provides in relevant part that a federal employee may not

> **(A)** make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]
>
> **(B)** involve [the federal] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341(a)(1)(A), (B). Section § 1341(a)(1)(B) thus prevents a federal employee from *entering a contract* or binding the federal government in advance of congressional appropriations. And § 1341(a)(1)(A) prohibits an employee from *making a payment* that would exceed the amount available in an appropriation made by Congress. Violation of the Act can result in criminal sanctions.

The *Ferris* doctrine as articulated by the Court of Claims and the GAO fully implements the Act. As required by § 1341(a)(1)(B), no contract binds the United States unless and until Congress makes the relevant general appropriation. And as required by § 1341(a)(1)(A), an agency official is powerless to make payments on the contract once appropriations have been exhausted.

What the Court of Claims and the GAO have declined to add – and what the government now asks seeks from this Court – is a provision that Congress has not seen fit to add, such that exhaustion of an appropriation that was ample at the time the contract was awarded somehow frees the government from contractual liability. For a number of reasons, this Court should not rewrite the statute.

First, the Antideficiency Act is a finely reticulated statute that reflects the government's substantial interests on both sides of the issue. That is, just as Congress has an interest in limiting unauthorized expenditures, it also has a substantial long-term interest in treating its contracting partners fairly. When Congress has balanced those interests and concluded that the interests of private parties merit particular protection, this Court should hesitate to disrupt that balance. *See, e.g.*, *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) ("The choice we are urged to make is a matter of high policy for resolution within the legislative process . . . . That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives."); *see also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981).

Second, the government here seeks to overturn settled judicial precedent of which Congress is surely aware. The *Ferris* doctrine has been the law for more than 120 years. Over that period, Congress has repeatedly amended the Antideficiency Act, yet has never sought to modify (much less overrule) *Ferris*. When Congress has tacitly approved a judicial interpretation in this manner, this Court should leave to Congress the job of making any necessary changes. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) (noting that "the force of precedent here is enhanced" by Congress's decision to amend the statute without modifying earlier court decisions on the same subject); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379-82 (1982) (same).

Third, the government is not dependent on this Court to vindicate its interests. If the government concludes that, notwithstanding 120 years of history, the *Ferris* doctrine is somehow unworkable, the government is fully capable of

making its concerns known to, and seeking effective relief from, Congress.

Fourth, abandoning *Ferris* at this stage would disrupt the substantial reliance interests and settled expectations of the government contractors who have made countless contracts on the firm understanding that *Ferris* provides the relevant legal framework. *See, e.g.*, *Jones v. R. R. Donnelley & Sons Co.*, 124 S. Ct. 1836, 1845 (2004) (rejecting interpretation of a statute that would disrupt settled expectations and adopting interpretation which "protect[s] settled interests"); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (noting that "settled expectations should not be lightly disrupted").

Finally, the government's approach would place § 1341 in some tension – if not outright conflict – with 31 U.S.C. § 1342. Section 1342 bars a contracting officer from creating an agreement under which the contractor becomes a "volunteer" of his services. Section 1342 thus makes it illegal for the government to enter into contracts under which the contractor provides goods or services for which it will not receive compensation. *See generally* GAO Redbook at 6-55 to 6-71 (describing "voluntary services"); 48 C.F.R. § 32.704(c). Adopting the government's interpretation would bypass the appropriations process and result in contractors' providing goods and services to the government "voluntarily" without compensation. *See, e.g.*, *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (statutory construction is a "holistic endeavor" in which the meaning of a provision "is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law"); *Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994) (interpreting one provision of a statute to avoid incompatibility with other provisions).

In short, there is no justification for this Court to read the Antideficiency Act other than as written.

3. The fact that the contracts are "subject to the availability of appropriations" does not support the government's position.

Nor is there any merit to the government's argument that the implausible interpretation it offers is mandated by the qualification that contracts under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n ("ISDA"), are "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b). The government suggests, for example, that the "subject to the availability of appropriations" clause in both the ISDA and the contracts themselves placed the risk of insufficient appropriations on the contractors. *See* United States Brief in Opposition in No. 02-1472 at 20. But the question before the Court is exactly what risk the contractors took. For more than 120 years, the risk borne by contractors has been that Congress will limit appropriations – either by a zero-funding clause or by capping funding in a specific line-item appropriation – not that the agency will exhaust appropriated funds without meeting its contractual obligations. Once Congress provides a general lump-sum appropriation that is sufficient to cover the contract, the contingency covered by the "subject to" clause has been met, and the clause has no further import. *See, e.g.*, 39 Comp. Gen. 340 (1959) (noting that agreement becomes operative "if and when the appropriation subsequently is made"); *see also* 48 C.F.R. § 32.705-1; *id.* § 52.232-18. That is particularly the case here, where statutory contracts are at issue and award is *required* upon passage of appropriations. There is simply no basis in law or

policy for the government's novel contention that the clause – standard in statutes and government contracts – was intended to put the risk of agency overspending on the contractor. Indeed, from the contractors' standpoint, entering a contract with such a clause would be suicide. *See supra* pp. 12-14.

The government is also wrong that application of the *Ferris* doctrine would somehow render the "subject to the availability of appropriations" language in the statute "largely superfluous." Petition of the United States in 03-853 at 18.

First, the "subject to" language implements § 1341(a)(1)(B)'s prohibition on making a contract before Congress appropriates funds, while allowing the government to fix the terms of dealing in advance of the appropriation. That is, the government often wants to fix the terms of a contract before appropriations are available. The government may, for example, wish to lock in certain coal prices in May, without waiting until appropriations are made on October 1 at the start of the fiscal year. Any contract that obligated the government to purchase or accept delivery of coal prior to the appropriation would, however, violate the Antideficiency Act.

The inclusion of the "subject to" language in the statute or contract permits the government to set the terms of dealing between the United States and the contractor, while avoiding liability under the Antideficiency Act by ensuring that the contract does not become operative – and thus imposes no liability on the United States – unless and until there is a subsequent congressional appropriation. *See, e.g.*, 21 Comp. Gen. 864, 864-65 (1942) (holding that there is "no objection to the award of a conditional contract to receive and pay for coal as long as the contract "provides by its

terms that the Government's liability thereunder is contingent upon the future availability of appropriated moneys with which to make payment for the coal"); 39 Comp. Gen. 340 (1959) ("[A] conditional contract may be entered into prior to enactment by the Congress of an appropriation therefore – that is a contract which specifically provides by its terms that the government's liability thereunder is contingent upon the future availability of appropriated moneys with which to make payment for the contract purposes. Such a contract, of course, would become operative only if and when the appropriation subsequently is made.") (internal citation omitted). Indeed, federal procurement regulations expressly require the "subject to" language for exactly that purpose. *See* 48 C.F.R. § 32.702 (requiring contracting officer to "obtain written assurance from responsible fiscal authority that adequate funds are available" or "expressly condition the contract upon availability of funds"); *id.* § 32.703-2 (describing contracts conditioned on availability of funds); *id.* § 32.705-1 (contracting in advance of funds).[6] Once Congress has made the appropriation, the condition imposed by the "subject to" clause has been satisfied, the contract becomes operative, and the "subject to" clause becomes largely irrelevant.

Second, the "subject to" language makes clear that the agency lacks authority to enter into a contract in the absence of appropriations. Section 1341(a)(1)(B) generally permits contracts to be made in even in the absence of appropriations

---

[6] That mechanism was apparently used here. ISDA contracts are apparently "negotiated" and "signed" at least 90 days before the start of the fiscal year (and thus before the appropriation). By including the term "subject to the availability of appropriations," the ISDA allows the government to reach agreement with the Tribes in advance of appropriations.

when those contracts are "authorized by law." *See* § 1341(a)(1)(B). Certain statutory provisions that use mandatory contracting language or that specifically reference authority to contract notwithstanding appropriations have been held to fall within the "authorized by law" exception. *See generally* GAO Redbook at 6-54 to 6-55 (providing examples); *see also* 21 Comp. Gen. 335 (1941) (concluding, in light of the absence of language making Library of Congress' statutory duty contingent on appropriations, that the Antideficiency Act allowed the Library to implement a statute that provided for mandatory within-grade salary advancements even though doing so would create a deficiency); 38 Comp. Gen. 93 (1958) (finding no violation of the Antideficiency Act for complying with statute requiring the transfer of funds to an Indian Tribe even though the agency did not have sufficient unobligated funds to pay the Tribe).

When Congress includes the "subject to" language, an agency unambiguously lacks authority to bind the United States in the absence of a subsequent congressional appropriation, and it is clear that a zero funding restriction or other specific congressional appropriations limitation overrides even an otherwise unqualified agency payment obligation. *See, e.g.*, 28 Comp. Gen. 163, 165-66 (1948) (distinguishing between language that giving agency authority to enter a "firm contract" and authority pursuant to which no legal authority exists unless and until appropriation is made); Comptroller General Letter to Senator Alan Cranston, 1990 WL 10007871, at *3-*4 (Aug. 24, 1990) (concluding that "subject to" language in statute that required Department of Veterans Affairs ("DVA") to provide for the collocation of at least three regional offices with DVA medical centers deprived the DVA of "contract authority" to enter into obligations for leases in excess of

appropriations or available funds). Inclusion of the "subject to" language thus avoids the difficult questions regarding the interplay of mandatory statutory duties and specific funding restrictions in appropriations statutes that have produced unfunded mandates and bedeviled the lower courts. *See, e.g., New York Airwaves, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966); *Gibney v. United States*, 114 Ct. Cl. 38 (1949).

The remaining arguments available to the government fare no better. *Ferris* does not, for example, create insurmountable practical difficulties for agencies or for Congress, as 120 years of uninterrupted practice make clear. To the contrary, the agency is capable of managing its money so it does not exceed its appropriation. The agency can, for example, determine its needs in advance and can issue the contracts in lesser amounts. Contracting agencies do that all the time when dealing with defense contractors and contractors in other industries, and such advance planning has long provided a sensible way to manage contracting costs in a way that is fair to both the contractor and the government. Indeed, encouraging such pre-contract budgeting is one of the principal purposes of 31 U.S.C. §§ 1512-1514.

Nor can the government intone with talismanic effect that contractors must "turn square corners" when dealing with the government. That obligation is a two way street. *See Winstar*, 518 U.S. at 886 n.31 (citing cases). Indeed, "when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Winstar*, 518 U.S. at 895 (plurality opinion; quotation marks and citation omitted); *accord Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604,

607 (2000); *Franconia*, 536 U.S. at 141. Yet what the government seeks here – a unilateral right to limit its contractual obligations by spending appropriated money elsewhere – finds no parallel in private contracts; indeed, it is antithetical to fundamental principles of private contract law.

When the government makes a contract and Congress appropriates sufficient money to pay for that contract, the government should be held to its bargain.

II. Congress Cannot Limit Retroactively The Government's Contract Liability After That Liability Is Fixed.

The Tenth Circuit below offered an alternative rationale to defeat the contractors' claims. In the years at issue in these cases, Congress had included in committee reports, but *not* in the appropriations acts themselves, recommended limits on the money available to fund portions of the ISDA contracts. In October 1998 (for fiscal year 1999), after the contracts at issue here had been fully performed and after the right to payment had vested, Congress passed the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998). Section 314 of that Act provided, in relevant part, as follows:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs . . . are the total amounts available for fiscal years 1994 through 1998 for such purposes . . . .

Pub. L. No. 105-277, § 314, 112 Stat. at 2681-468. The Tenth Circuit held that, in light of Section 314, the recommendations in the earlier committee reports were retroactively binding and capped the funds available to fund ISDA contracts.[7]

The Tenth Circuit's decision is meritless. Even assuming that a statutory cap on available appropriations would be binding, Congress may not impose such a cap retroactively.

This Court has made clear repeatedly that Congress lacks power to repudiate retroactively the government's contractual obligations. In *Lynch v. United States*, 292 U.S. 571 (1934), for example, Congress passed legislation seeking to invalidate "war risk" insurance policies. When that legislation was challenged, this Court ruled in favor of the insureds. The Court noted that the "war risk policies, being contracts, are property and create vested rights" that are protected by the Fifth Amendment. 292 U.S. at 577. The Court noted that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Id.* at 579. Accordingly, "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts . . . would be . . . an act of repudiation," with "all the wrong and reproach that term implies." *Id.* at 580.

---

[7] It is unclear whether the government intends to raise this argument in precisely this form. The Federal Circuit noted expressly that "the Secretary does not directly argue that section 314 retroactively limits the amount of funds available in the earlier years," Pet. App. in No. 03-853 at 26a, and the government's filings thus far in this Court are somewhat ambiguous on this point. *Amici* briefly address the argument in the event the United States seeks to resurrect the argument here.

Perry v. United States, 294 U.S. 330 (1935), is to the same effect. There, Congress sought by joint resolution to eliminate its obligations to redeem certain bonds in gold. This Court invalidated the congressional action, rejecting the government's argument that "Congress can disregard the obligations of the government at its discretion" and holding that "[w]e do not so read the Constitution." 294 U.S. at 350; *see also id.* (rejecting notion that "when the government borrows money, the credit of the United States is an illusory pledge").

The continuing vitality of *Lynch* and *Perry* was reaffirmed unambiguously in *Winstar*. In *Winstar*, the Court rejected the argument that Congress has authority to avoid the government's contractual liability at will. The Court held that "allowing the Government to avoid contractual liability merely by passing any 'regulatory statute' would flout the general principle that, '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" 518 U.S. at 895 (quoting *Lynch*, 292 U.S. at 579); *see also id.* at 912-13 (Breyer, J., concurring) (relying on *Lynch* and *Perry*); *id.* at 924 (Scalia, J., concurring) (citing *Lynch* and *Perry* and noting that "the Government may not simply repudiate its contractual obligations"). Indeed, the government lacks the power to "abrogate one of its contracts by a statute abrogating the legal enforceability of that contract, government contracts of a class including that one, or simply all government contracts." 518 U.S. at 879 n.22.

Unsurprisingly, the Court of Claims and Federal Circuit have held for more than a century that when a right to payment has vested, Congress is powerless to eliminate that right retroactively through limitations on appropriations or

other similar legislation. *See, e.g., Corliss Steam-Engine Co. v. United States*, 10 Ct. Cl. 494, 501-20 (1874) (invalidating effort by Congress to avoid terms of settlement agreement), *aff'd*, 91 U.S. 321 (1875); *Seatrain Lines, Inc. v. United States*, 99 Ct. Cl. 272, 314-15 (1943) (appropriations rider providing that "no part of the money appropriated should be paid" on the contract at issue could not divest the contractor of his right to payment because the "valid contract is protected by the Fifth Amendment and cannot be taken away without making just compensation"); *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 553 (Ct. Cl. 1980) (legislation seeking to preclude payment enacted after payment fell due was "a violation of the Government's contract obligation").

Nothing in the "subject to" language changes that analysis. *See, e.g., Blackhawk*, 622 F.2d at 542 (holding that legislation enacted after payment came due was insufficient to defeat right to payment despite clause providing that "[t]he Government's obligation hereunder is contingent upon the availability of appropriated funds from which payment in full can be made"). The "subject to" language makes clear that the contractor has no vested right to payment – indeed no operative contract at all – unless Congress has made sufficient appropriated funds legally available. However, once Congress has made such an appropriation and the contractor has a vested right to payment under the contract, the "subject to" language does not give Congress the continuing right to pass legislation that extinguishes the right to payment.

CONCLUSION

The decision of the Federal Circuit that neither exhaustion of a general appropriation account nor retroactive legislation can relieve the government of its contractual obligations should be affirmed.

Respectfully submitted,

HERBERT L. FENSTER
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 496-7500

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

IAN HEATH GERSHENGORN*
DONALD B. VERRILLI, JR.
DAVID A. CHURCHILL
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

* *Counsel of Record*

Counsel for Amici Curiae

Nos. 02-1472 & 03-853

Supreme Court, U.S.
FILED
JUN 18 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY G. THOMPSON, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents,

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH CIRCUIT AND FOR THE FEDERAL CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS SUPPORTING THE CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES

JOHN DOSSETT
GENERAL COUNSEL
NATIONAL CONGRESS OF AMERICAN INDIANS
1301 Connecticut Ave., N.W.
Suite 200
Washington, DC 20036

EDWARD C. DUMONT
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE ISDA WAS ENACTED IN 1975 TO FURTHER A NEW NATIONAL POLICY OF TRIBAL SELF-DETERMINATION. 4

II. THE ISDA'S UNUSUAL HISTORY DEMONSTRATES THAT CONGRESS PROGRESSIVELY CONSTRAINED SECRETARIAL DISCRETION IN AN EFFORT TO COMPEL PROPER IMPLEMENTATION OF THE ACT 7

A. In Its First Review Of The ISDA's Implementation, Congress Concluded That The Secretaries Had Maintained Excessive Federal Administration, While Failing To Reimburse Tribes For The Indirect Costs Of Administering Federal Operations 7

B. The 1988 Amendments Cut Back Sharply On Secretarial Discretion Regarding The Administration And Funding Of ISDA Contracts 11

1. Distinguishing Between Tribal And Federal Administrative Costs 11

2. Eliminating Unnecessary Federal Administrative Requirements 13

3. Contract Funding 14

4. Contract Enforcement 15

TABLE OF CONTENTS—Continued

Page

C. The 1994 Amendments Reflect Congress's Final Decision To Eliminate Executive Discretion With Respect To ISDA Contracts 17

III. IN LIGHT OF THE ISDA'S HISTORY, ITS FUNDING PROVISIONS CANNOT BE CONSTRUED TO MAKE REIMBURSEMENT OF TRIBAL CONTRACT SUPPORT COSTS DEPEND ON THE SECRETARY'S DISCRETIONARY DECISIONS CONCERNING THE FUNDING OF FEDERAL ADMINISTRATIVE COSTS 21

A. The Governmental Nature Of ISDA Contracts Does Not Undermine Their Enforceability 22

B. Congress Did Not Give Federal Administrators Discretion To Determine When Funds Are "Available" To Pay CSCs 23

C. In The Absence Of Specific Congressional Action, The Risk Of A Shortfall In Overall Appropriations Should Be Borne By The Secretaries, Not By Tribes 25

CONCLUSION 28

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Page(s)

Ramah Navajo School Board, Inc. v. *Bureau of Revenue*, 458 U.S. 832 (1982) 4, 5

Ramah Navajo School Board, Inc. v. *Babbitt*, 87 F.3d 1338 (1996) 22

United States v. *Lara*, 124 S. Ct. 1628 (2004) 4

STATUTES

Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 5

§ 102, 88 Stat. 2206 ..... 6, 12

§ 103, 88 Stat. 2206 ..... 6, 12

§ 105, 88 Stat. 2208 6

§ 106(a), 88 Stat. 2210 ..... 6, 9

§ 106(h), 88 Stat. 2211 ..... 6, 11, 14

§ 107(a), 88 Stat. 2212 6

§ 108, 88 Stat. 2212 ..... 6, 18

Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 7

§ 102, 102 Stat. 2285 12

§ 103, 102 Stat. 2286 13

§ 104, 102 Stat. 2287 14

§ 201, 102 Stat. 2288 12

§ 204, 102 Stat. 2291 13

§ 205, 102 Stat. 2292 ..... 14, 15

§ 206, 102 Stat. 2294 16

§ 207, 102 Stat. 2295 ..... 14, 17

§ 208, 102 Stat. 2296 ..... 14, 18

102 Stat. 2298 legis. hist. note 8

Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, 108 Stat. 4250 18

§ 101, 108 Stat. 4251 18

§ 102, 108 Stat. 4257 ..... 19, 20

§ 103, 108 Stat. 4260 20

TABLE OF AUTHORITIES—Continued

Page(s)

§ 104, 108 Stat. 4268 20
§ 105, 108 Stat. 4269 21
25 U.S.C. § 450(a) 5
25 U.S.C. § 450a(a) 5
25 U.S.C. § 450f(a) 3, 12, 20, 26
25 U.S.C. § 450f(b) 19, 20
25 U.S.C. § 450f(e) 20, 26
25 U.S.C. § 450i 6
25 U.S.C. § 450j(a) 13
25 U.S.C. § 450j-1 ..... 1, 3, 14
25 U.S.C. § 450j-1(a) 3, 14, 18
25 U.S.C. § 450j-1(b) ..... *passim*
25 U.S.C. § 450j-1(c) 27
25 U.S.C. § 450k 13, 21
25 U.S.C. § 450k(3) 14
25 U.S.C. § 450*l*(c), sec. 1(a)(2) 20, 25
25 U.S.C. § 450m-1 16
25 U.S.C. § 450m-1(a) 20, 23, 26, 27
25 U.S.C. § 450m-1(d) 23
31 U.S.C. § 1304 27
Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.* 16
41 U.S.C. § 612 28

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 103-740 (1994) 24
S. Rep. No. 100-274 (1988) ..... *passim*
S. Rep. No. 103-374 (1994) 17, 18, 20, 21
Indian Self-Determination and Education Assistance Act Amendments of 1987: Hearing on S. 1703 Before the Senate Select Committee on Indian Affairs, 100th Cong. (Sept. 21, 1987) 7, 11
Indian Self-Determination and Education Assistance Act, Public Law 93-638: Hearings Before the Senate Select Committee on Indian Affairs, 100th Cong. (Apr. 22, 1987) 7
134 Cong. Rec. 12860 (1988) 8

TABLE OF AUTHORITIES—Continued

Page(s)

134 Cong. Rec. 23335 (1988) 8
134 Cong. Rec. 24038 (1988) 8
59 Fed. Reg. 3167 (Jan. 20, 1994) 19
1988 U.S.C.C.A.N. 2620 8

MISCELLANEOUS

Felix S. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law* (1982) 4, 5
General Accounting Office, 3 *Principles of Federal Appropriations Law* (2d ed. 1994) 28
Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564 (July 8, 1970) 4

Amicus the National Congress of American Indians respectfully submits this brief supporting affirmance of the judgment of the Federal Circuit in No. 03-853, and reversal of the judgment of the Tenth Circuit in No. 02-1472.[1]

INTEREST OF AMICUS

The National Congress of American Indians (NCAI) was founded in 1944 and is the oldest and largest tribal government organization in the United States. NCAI serves as a forum for consensus-based policy development among its membership of over 250 tribal governments from every region of the country. NCAI's mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments. NCAI and its members have considerable experience with the history and operation of self-determination contracts under the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), 25 U.S.C. §§ 450 *et seq.* NCAI submits this brief in order to help the Court understand the questions presented in a broader context framed by the unusual history of the ISDA, and the national policy of tribal self-determination.

SUMMARY OF ARGUMENT

These cases require construction of the funding provision of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450j-1. All agree that contracts the Secretary entered into with petitioners the Cherokee Nation and the Shoshone Paiute Tribes under that Act call, on the face of things, for the payment of "contract support costs" (CSCs) in amounts greater than the Secretary has yet paid.[2]

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than NCAI, its members or its counsel made any monetary contribution to the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this brief have been submitted to the Clerk.

[2] Although the Cherokee Nation is the respondent in No. 03-853, for simplicity we refer to both Tribes as petitioners.

The Secretary argues that he has no obligation to pay the additional amounts because the ISDA provides that contract funding "is subject to the availability of appropriations." 25 U.S.C. § 450j-1(b). As the Tribes' brief demonstrates, however, funds sufficient to pay the costs at issue in these cases were "available" within the ordinary meaning of that term as a matter of federal contracting and appropriations law. The Secretary's core argument is instead that the necessary appropriations were "not *meaningfully* 'available' to pay contract support costs." 03-853 Pet. 24 (emphasis added). By this he evidently means that it would have been difficult for him to fund full payment of petitioners' CSCs without either seeking more money from Congress, or cutting the agency's own budget in ways that he thinks would be "absurd." *Id.* In addition, the Secretary now seeks to rely on statutory language providing that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe under [the ISDA]." 25 U.S.C. § 450j-1(b).

Faced with such arguments, this Court might at first be inclined to defer to the interpretations and judgment of a federal Officer who has been charged by Congress with partial responsibility for administering the ISDA. In this case, that would be a perverse mistake. The ISDA is a cornerstone of the national policy of tribal self-determination, and is intended to transfer the responsibility and resources for operating federal Indian programs from federal agencies to tribal governments. Tracing the history of the ISDA from its enactment in 1975 through substantial amendments in 1988 and 1994 shows the unusual evolution of a statute under which Congress has repeatedly *stripped* the implementing federal agencies of discretion, largely because of Congress's conclusion that the agencies were protecting their own bureaucracies, rather than devoting available funds to advancing the goals of the ISDA. In particular, the history shows that Congress intended to place the Secretary under the strongest possible obligation to fully fund contract support costs—without measurable discretion, and even at the expense of the agency's own internal operations. And Con-

gress consciously chose to make the Secretary's obligations to ISDA Tribes enforceable against the agency to at least the same extent as other government contracts.

Against this backdrop, the only reasonable approach in this case is for the Court to enforce petitioners' contracts, and the ISDA, in accordance with their terms. Congress did not give the Secretary discretion to determine when funds are "available" to satisfy ISDA obligations. As between the Secretary and an ISDA Tribe, Congress placed the risk of any overall budgetary shortfall squarely on the Secretary—not the Tribes.

ARGUMENT

Through the ISDA, Congress has "directed" the Secretary to enter into a self-determination contract with any qualified Tribe that wishes to assume direct operation of a federal program that would otherwise be administered by the Secretary for the benefit of the Tribe and its members. 25 U.S.C. § 450f(a)(1). As amended in 1988 and 1994, the Act imposes very specific requirements concerning the funding that the Secretary must provide under such contracts. *Id.* § 450j-1. In particular, the funding must include an amount to cover "contract support costs," and "shall not be reduced by the Secretary to pay for Federal functions." *Id.* § 450j-1(a)(2), (b)(3).

These requirements are qualified by two provisos: The provision of funds is "subject to the availability of appropriations," and "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under [the ISDA]." *Id.* § 450j-1(b). The Secretary has argued that what funds are to be deemed "availab[le]," or what would cause a "reduc[tion]" in direct service, for purposes of Section 450j-1(b), must be left essentially to his discretion, based on his asserted need for flexibility in setting spending priorities for his agency. *See* 03-853 Pet. 17-20, 23-27; 02-1472 Br. in Opp. 16-17.

Because that argument may have a superficial plausibility, it is important for the Court to understand both the general policy of tribal self-determination that gave rise to the ISDA, and the very specific and unusual history of Congress's repeated efforts to reduce or eliminate agency discretion—in particular, discretion to pay for "Federal functions" rather than tribal contract support costs—and to compel faithful implementation of the Act. Against that background, it is clear that no argument based on secretarial discretion can provide a sound basis for construing the ISDA.

I. THE ISDA WAS ENACTED IN 1975 TO FURTHER A NEW NATIONAL POLICY OF TRIBAL SELF-DETERMINATION.

As this Court is well aware, federal policy concerning relations with the Indian Tribes has passed through many phases over time. *See, e.g.*, *United States* v. *Lara*, 124 S. Ct. 1628, 1634-1635 (2004). The important point for present purposes is that when the ISDA was enacted in 1975, it embodied a radical change in previous policies that had reflected at best an enervating federal paternalism, and at worst an express policy of terminating the legal recognition of tribal identity. In a landmark message to Congress in 1970, President Nixon called for a new approach, "explicitly affirm[ing] the integrity and right to continued existence of all Indian tribes."[3] Under the new regime, the United States would reaffirm its responsibility to Indian peoples, but it would increasingly seek to discharge that responsibility by rebuilding tribal leadership and institutions and pursuing government-to-government relationships with the Tribes. *See id.* at 1634; *Ramah Navajo Sch. Bd., Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 840 (1982) ("in the early 1970's the federal policy shifted toward encouraging the development of Indian-controlled institutions on the reservation"). This philosophy of tribal self-determination has provided the basis for federal Indian policy for the last 30 years.

[3] Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 567 (July 8, 1970); *see also, e.g.*, Felix S. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law* 180-206 (1982).

The self-determination policy found concrete expression in a number of new federal statutes—"most notably" the ISDA. *Ramah*, 458 U.S. at 840.[4] In enacting the ISDA in 1975, Congress found that:

> [T]he prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities[.]

Pub. L. No. 93-638, 88 Stat. 2203, § 2(a)(1), codified at 25 U.S.C. § 450(a)(1). It recognized the "obligation of the United States to . . . assur[e] maximum Indian participation in the direction of . . . Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities." *Id.* § 3(a), 25 U.S.C. § 450a(a). And it

> declare[d] its commitment to . . . the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by

[4] *See also* Cohen, *supra*, at 188-204 (discussing the ISDA and other "Self-Determination Era" statutes, such as the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341; the Indian Financing Act of 1974, 25 U.S.C. § 1451; and the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963).

the Indian people in the planning, conduct, and administration of those programs and services.

Id. § 3(b), 25 U.S.C. § 450a note; App. 1a.[5]

To give these goals practical form, Congress "directed" the Secretaries of the Interior and of Health, Education, and Welfare "to enter into a [self-determination] contract or contracts" with any qualified Tribe that so requested. *Id.* §§ 102-103, 88 Stat. 2206-2207; *see* App. 1a. These contracts were designed to transfer to the Tribe the responsibility and resources "to plan, conduct, and administer [federal] programs" that would otherwise be provided for Indians by the Secretaries, either directly or through similar contracts with States or state agencies. *Id.*

In keeping with this purpose, the Act included extensive provisions to facilitate the transfer of federal personnel to tribal supervision or employment. *Id.* § 105, 88 Stat. 2208-2210; *see* 25 U.S.C. § 450i & codification note. As to funding, it provided that the amount paid under each contract "shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof" covered by a contract. ISDA § 106(h), 88 Stat. 2211-2221; App. 3a. And as to administration, the Act generally gave the relevant Secretaries the usual broad discretion to determine how best to effectuate Congress's goals. *See id.* § 107(a), 88 Stat. 2212 (subject to certain consultation requirements and time limits, Secretaries "are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this title").[6]

---

[5] For the Court's convenience, we have reprinted in an appendix to this brief selected provisions of the ISDA, as originally enacted and then as amended in 1988 and 1994.

[6] *See also, e.g., id.* § 106(a), 88 Stat. 2210 (contracts to be "in accordance with all Federal contracting laws and regulations except that ... the appropriate Secretary may waive any provisions ... which he determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of this Act"); *id.* § 108, 88 Stat. 2212 (contracting Tribes to submit annual report including "such other information as the appropriate Secretary may request").

It is important to emphasize that nothing in the ISDA was intended to transfer the ultimate responsibility for funding contracted programs from the federal government to the Tribes. These were still *federal* programs. What the ISDA aimed to change was the way that these federal programs were administered. It was a direction to the federal agencies that had been running them to turn their operation over, on request, to tribal governments—thus, necessarily, *pro tanto* reducing the agencies' own operations. Perhaps not surprisingly, that policy turned out to be more easily articulated than enforced.

II. THE ISDA'S UNUSUAL HISTORY DEMONSTRATES THAT CONGRESS PROGRESSIVELY CONSTRAINED SECRETARIAL DISCRETION IN AN EFFORT TO COMPEL PROPER IMPLEMENTATION OF THE ACT

A. In Its First Review Of The ISDA's Implementation, Congress Concluded That The Secretaries Had Maintained Excessive Federal Administration, While Failing To Reimburse Tribes For The Indirect Costs Of Administering Federal Operations

A dozen years after the initial enactment of the ISDA, Congress undertook a "comprehensive reexamination" of the Act. S. Rep. No. 100-274, at 1 (1988 Rep.).[7] That careful review of how the relevant Secretaries had implemented the statute during its first decade led to a number of pointed revisions to the legislation. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988 Amendments); *see* App. 4a-11a.

---

[7] *See also Indian Self-Determination and Education Assistance Act Amendments of 1987: Hearing on S. 1703 Before the Senate Select Comm. on Indian Affairs*, 100th Cong. (Sept. 21, 1987) (*S. 1703 Hrg.*); *Indian Self-Determination and Education Assistance Act, Public Law 93-638: Hearings Before the Senate Select Comm. on Indian Affairs*, 100th Cong. (Apr. 22, 1987).

The Senate Report addressing the 1988 Amendments first noted that the ISDA was intended "to assure maximum participation by Indian Tribes in the planning and administration of federal services, programs and activities for Indian communities." 1988 Rep. 1.[8] While it praised the "remarkable progress" that Tribes and the relevant agencies had made toward that goal (*id.* at 6; *see id.* at 4-6), the Committee recognized that there had been significant problems with implementation of the Act (*id.* at 6-8).

To put these problems in proper context, the Committee recalled a sticking point that President Nixon had identified when he first called for a renewed self-determination policy: Before the ISDA, "when a decision [was] made as to whether a Federal program [would] be turned over to Indian administration, it [was] the Federal authorities, and not the Indian people who finally ma[d]e that decision." 1988 Rep. 3 (quoting [1970] Pub. Papers at 567). To reverse that historical reality, the ISDA had "uniquely require[d]" the relevant Secretaries to "transfer resources and control over [federal] programs to [requesting] tribe[s]." *Id.* at 6. There was, the Committee noted, "no other example of a Secretary being required to transfer resources to assist another governmental entity and simultaneously to divest itself of its own resources." *Id.* This already unusual situation had been exacerbated by "difficult federal budget pressures," under which "federal agencies and tribes ha[d] been competing for the same federal funds to carry out their respective responsibilities." *Id.* at 7.

Against this background, the Committee stressed that when Congress passed the ISDA, it "envisioned a clear-cut

[8] The 1988 amendments originated in the House of Representatives as H.R. 1223. The Senate Report addressed a companion bill, S. 1703. The Senate ultimately passed the House bill after amending it to conform in large part to the Senate bill. 134 Cong. Rec. 12860-12862 (1988). The House concurred in part in the Senate amendments, and the Senate accepted the House's changes. 134 Cong. Rec. 23335-23341, 24038-24043 (1988); *see* 102 Stat. 2298 legis. hist. note; 1988 U.S.C.C.A.N. 2620.

transfer [to Tribes] of federal responsibilities as well as federal financial, administrative, technical and other resources." 1988 Rep. 6. Looking back over the previous decade, however, the Committee identified two principal obstacles that had "interfered with the contractual relationship contemplated by the Act." *Id.* at 7.

First, although ISDA gave each Secretary the discretion to waive the application of federal contracting laws and regulations, *see* 88 Stat. 2210 (§ 106(a)); App. 2a, the Committee observed that instead the Secretaries' "inappropriate application of federal procurement laws and federal acquisition regulations to self-determination contracts ha[d] resulted in excessive paperwork and unduly burdensome reporting requirements." 1988 Rep. 7. This both unduly increased the cost of transferring functions under the Act (*see id.* at 7-8, 9), and meant that "[t]he federal service bureaucracy that was supposed to be reduced as tribes assumed control of programs [had instead] been replaced by a contract monitoring bureaucracy" (*id.* at 7). The Secretaries' decision to support this continued agency involvement led in turn to "budgetary allocations to cover federal pay costs, retirement costs and other federal needs," which reduced the funds available to the Tribes for the federal functions they had contracted to discharge, and "inject[ed] uncertainty into the planning and management of tribal programs." *Id.* at 8. In other words, rather than exercising their discretion to streamline the transfer of functions to tribal governments, the Secretaries had exercised it in a way that interfered with that transfer, while perpetuating the federal administrative establishment.

Second, the Committee identified "[p]erhaps the single most serious problem with implementation of the Indian self-determination policy" as "the failure of the [Secretaries] to provide funding for the indirect costs associated with self-determination contracts." 1988 Rep. 8; *see id.* at 8-13. The Committee explained (*id.* at 8-9):

> The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial

> management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. Tribal funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility.

In this regard, the Committee emphasized that under self-determination contracts, Tribes were "operating federal programs and carrying out federal responsibilities." 1988 Rep. 9. They "should not be forced to use their own financial resources to subsidize federal programs." *Id.* Moreover, to the extent that contracting with Tribes might entail additional administrative costs at the *tribal* level, the Committee recognized that such expenditures, unlike money spent on administration by federal agencies, directly served a "fundamental objective of the federal policy of Indian self-determination," which is "to increase the ability of tribal governments to plan and deliver services appropriate to the needs of tribal members." *Id.* at 5; *see id.* at 4 (improvement in tribal government administrative capabilities was financed in part by "indirect cost reimbursement associated with self-determination contracts"); *id.* at 11 (discussing report by Interior Department's Inspector General). Finally, the Committee repeatedly faulted the Secretaries for "fail[ing] to request from Congress the full amount of funds needed to fully fund indirect costs associated with self-determination contracts." *Id.* at 9; *see id.* at 12, 13.

In sum, the Committee expressed exasperation with the way that the Secretaries had administered the largely discretionary funding provision in the original ISDA, which required only that contract funding be "not less than" the amount a Secretary would have provided for his "direct operation" of a program (88 Stat. 2211 (§ 106(h)); App. 3a):

> The Federal Government would not consider it proper to short-change funding for contracts with private suppliers of goods and services. When the Bureau of Indian Affairs and the Indian Health Service contract with Indian tribes, however, they routinely fail to reimburse tribes for legitimate administrative costs associated with carrying out federal responsibilities. Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.

1988 Rep. 13.[9] In response, it declared its intention to amend the ISDA in a manner specifically designed "to require the [Secretaries] to comply with the requirement of the Act that indirect costs be added to the amount of funds available for direct program costs." *Id.* at 12.

B. The 1988 Amendments Cut Back Sharply On Secretarial Discretion Regarding The Administration And Funding Of ISDA Contracts

The 1988 Amendments themselves directly reflect Congress's concern with the Secretaries' (i) excessive preservation of a federal administrative structure and (ii) failure to provide adequate funding for the indirect costs incurred by Tribes in administering contracted federal operations.

---

[9] *See also S. 1703 Hrg.* 55 (statement of Chairman Inouye) ("A final word about contracts: I am a member of the Appropriations Committee, and there we deal with contracts all the time. Whenever the Department of Defense gets into a contract with General Electric or Boeing or any one of the other great organizations, that contract is carried out, even if it means supplemental appropriations. But strangely in this trust relationship with Indians they come to you maybe halfway or three quarters through the fiscal year and say, 'Sorry, boys, we don't have the cash, so we're going to stop right here' after you've put up all the money.").

1. Distinguishing Between Tribal And Federal Administrative Costs

To begin with, the amendments added a new sentence to the Act's "declaration of policy": "In accordance with this policy [of self-determination], the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 1988 Amendments § 102, 102 Stat. 2285 (amending ISDA § 3(b), 25 U.S.C. § 450a(b); App. 4a). This newly articulated commitment reflects Congress's express understanding that ISDA funds spent on the indirect costs that tribal governments incur in administering federal contracts directly serve the ISDA's purpose of enhancing tribal self-determination. The same cannot, of course, be said of federal agencies' administrative costs.

Along the same lines, Congress consolidated what were originally separate sections dealing with the Secretary of the Interior and the Secretary of Health, Education, and Welfare (by 1988, Health and Human Services). 1988 Amendments § 201, 102 Stat. 2288 (amending ISDA § 102 and repealing or redesignating § 103); App. 6a-7a. The two original sections had used different wording to describe the scope of an ISDA contract. *Compare* ISDA § 102(a), 88 Stat. 2206 ("to plan, conduct, and administer programs"), *with id.* § 103(a), 88 Stat. 2206-2207 ("to carry out any or all of his functions, authorities, and responsibilities under the Act of August 5, 1954," which transferred Indian health programs to the Public Health Service). In combining the two provisions, Congress clarified and expanded the scope of "programs" potentially covered, and selected the "plan, conduct, *or administer*" language to describe the nature of the contracts. 1988 Amendments § 201, 102 Stat. 2288 (emphasis added) (codified as later further amended at 25 U.S.C. § 450f(a)(1)); App. 6a. The Senate Committee explained its intention to make clear that "administrative functions of the Indian Health Service are contractible," that the Secretaries

were "not to consider any program or portion thereof to be exempt from self-determination contracts," and that contracted operations could include a wide range of administrative tasks that would otherwise be performed by the agencies at the "Area Office, Field Office, Agency and Service Unit" levels. 1988 Rep. 23-24. In short, Congress was focused on the transfer—not the preservation—of federal administrative functions.

2. Eliminating Unnecessary Federal Administrative Requirements

The 1988 Amendments also struck at the Secretaries' failure to use their authority to exempt ISDA contracts from federal procurement procedures, and the corresponding failure to realize expected reductions in federal administrative costs as operations were shifted to tribal administration. *See* 1988 Rep. 7. In amending the Act's definitions, Congress specified that "no contract entered into pursuant to this Act shall be construed to be a procurement contract," 1988 Amendments § 103, 102 Stat. 2286 (adding ISDA § 4(j)), in order to "make[] clear . . . that the system of federal acquisition regulations . . . should not apply to self-determination contracts," and in the hope that "the federal contract monitoring bureaucracy that has replaced the federal service bureaucracy [would] be greatly reduced over the next three years," 1988 Rep. 18-19. Similarly, in the section addressing contract administration, Congress added a proviso specifically directing that except for construction contracts, "the Office of Federal Procurement Policy Act . . . and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contracts." 1988 Amendments § 204, 102 Stat. 2291 (redesignating and amending ISDA § 105(a), codified as later further amended at 25 U.S.C. § 450j(a)).

In addition, in three places Congress mandated that any federal administrative requirement for entering into or monitoring ISDA contracts, including record-keeping and reporting requirements, must be promulgated through notice-and-comment rulemaking. 1988 Amendments §§ 104, 207,

and 208, 102 Stat. 2287, 2295, 2296 (amending and redesignating ISDA §§ 5, 107, and 108, codified as later further amended at 25 U.S.C. §§ 450c, 450k, and 450c(f)); *see* App. 5a, 10a. As the Senate Committee explained at some length, these amendments were intended in part "to prevent Federal agencies from imposing unnecessary contract compliance and reporting requirements on tribal contractors through the use of administrative policy directives," internal manuals, and the like. 1988 Rep. 20; *see id.* at 20-22, 39. They also provided a framework and schedule for the Secretaries to cooperate with Tribes in developing appropriate regulations to replace the cumbersome procurement rules that the Secretaries had previously applied. *Id.* at 38. The Committee specifically noted its expectation that the new regulations would be "relatively simple, straightforward, and free of unnecessary requirements o[r] procedures." *Id.* The Act itself required that they be promulgated within 10 months. 1988 Amendments § 207(b), 102 Stat. 2295-2296 (amending ISDA § 107(b), codified as later further amended at 25 U.S.C. § 450k(b)).

3. Contract Funding

As to the central question of contract funding, the 1988 Amendments replaced the original Act's one-sentence subsection dealing with funding with a lengthy new section of the Act, largely concerned with contract support costs. 1988 Amendments § 205, 102 Stat. 2292 (adding ISDA § 106, codified as later further amended at 25 U.S.C. § 450j-1); App. 8a-9a. The original provision had merely specified that contract funding must "not be less" than the relevant Secretary would have spent on a contracted operation—essentially leaving other funding questions to the relevant Secretary's discretion. ISDA § 106(h), 88 Stat. 2211.

In stark contrast, the new provision specifically recognized that contracting Tribes would incur CSCs, and required that those costs "be added to" the base funding amount. *See* 25 U.S.C. § 450j-1(a)(2). It further set out, in remarkable detail, a number of grounds that a Secretary was specifically *prohibited* from advancing as justifications for

reducing the contract funding provided to a Tribe. *See* 25 U.S.C. § 450j-1(b). These forbidden grounds included "mak[ing] funding available for contract monitoring or administration by the Secretary"; "pay[ing] for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring"; and "pay[ing] for the costs of Federal personnel displaced by a self-determination contract." *Id.*

The amendments thus imposed strict statutory prohibitions against what had previously been treated as funding allocations lying within the Secretaries' discretion. They also added several provisions addressing specific indirect-cost issues, including requiring the Secretary to submit an annual report to Congress that was to detail, among other things, "any deficiency of funds needed to provide required indirect costs to all contractors for [each] fiscal year." *See* 1988 Amendments § 205, 102 Stat. 2293 (adding ISDA § 106(c)-(i), including § 106(c)(2), codified as later further amended at 25 U.S.C. § 450j-1(c)-(i), including § 450j-1(c)(2)). And they introduced the two limited qualifications at issue here: "the provision of funds under this Act is subject to the availability of appropriations," and "the Secretary is not required to reduce funding for programs, projects, or activities *serving a tribe* to make funds available to another tribe" under the ISDA. 25 U.S.C. § 450j-1(b) (emphasis added).

As the Senate Report confirms, these changes were intended to "protect[] contract funding levels provided to tribes, and prevent[] the diversion of tribal contract funds to pay for costs incurred by the Federal government." 1988 Rep. 30; *see id.* at 30-34.

4. Contract Enforcement

A final significant aspect of the 1988 Amendments here is Congress's approach to the question of contract enforcement. The Senate Report indicates that the Committee:

> considered deleting the term "contract" and using another term such as "self-determination grant" or

> "intergovernmental agreement." Ultimately, however, the Committee determined that the use of the term "contract" is important to convey the sense of a legally binding instrument that cannot be terminated by administrative action without the legal consequences that would be associated with the termination of contractual obligations by either party.

1988 Rep. 19. Indeed, the 1988 Amendments reinforced the contractual nature of ISDA funding, adding to the statute a new section expressly providing for application of the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, and judicial enforcement in either district courts or what is now the Court of Federal Claims. 1988 Amendments § 206, 102 Stat. 2294-2295 (adding ISDA § 110, codified as later further amended at 25 U.S.C. § 450m-1); App. 11a.

These provisions substantially strengthened the remedies available to ISDA Tribes. The Senate Committee made clear that it believed they were "necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the [ISDA]." 1988 Rep. 37. Indeed, the Committee put the point bluntly:

> The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations.

Id. It illustrated its discussion with an example involving inadequate funding that, in the Committee's view, was the product "not . . . of a Congressional appropriation shortfall, but of a unilateral decision by the BIA" (*id.*)—that is, a decision the agency no doubt believed fell within its administrative discretion.

In sum, the history and substance of the 1988 Amendments demonstrate that Congress: (1) was frustrated by the

Secretaries' tendency to perpetuate an undue federal administrative role under the ISDA; (2) expressly directed the Secretary to pay for contract support costs, subject only to the availability of appropriations and the no-reduction clause; and (3) purposefully gave ISDA Tribes the right to pursue powerful contract remedies. These amendments substantially constrained the administrative discretion that the Secretaries had previously exercised in implementing the ISDA. They were, however, "necessary in order to meet the challenge presented by the tribes: to fully support the successful implementation of the federal policy of Indian Self-Determination." 1988 Rep. 13.

C. The 1994 Amendments Reflect Congress's Final Decision To Eliminate Executive Discretion With Respect To ISDA Contracts

In 1994, Congress again reviewed the Secretaries' performance in implementing the ISDA. It did not like what it found.

The 1994 Senate Report tersely recalls the same Committee's 1988 conclusion that the ISDA had "failed to meet its goal of reducing the federal bureaucracy and ending the federal domination of Indian programs," and had instead "spawned an increase in federal officials who were employed to monitor self-determination contracts." S. Rep. No. 103-374, at 2 (1994) (1994 Rep.). The 1988 amendments had been required because "the original goal of ensuring maximum tribal participation in the planning and administration of federal services" had been "undermined by excessive [federal] bureaucracy and unnecessary contract requirements." *Id.*

In 1988, Congress had acted to "remove . . . administrative and practical barriers." 1994 Rep. 2. The Committee had expected new implementing regulations to be issued quickly, and to be "relatively simple, straightforward, and free of unnecessary requirements." *Id.* (internal quotation marks omitted). Yet, despite the fact the statute (not just a Committee report) required that those regulations be issued within 10 months (*see* 1988 Amendments § 207, 102 Stat.

2296 (enacting ISDA § 107(b)(4))), the Secretaries had not published even proposed regulations until January 20, 1994. Moreover, those proposed rules contained "hundreds of new requirements," and were in many instances "more restrictive than existing regulations and raise[d] new obstacles and burdens for Indian tribes." 1994 Rep. 3 (internal quotation marks omitted); *see also id.* at 14 (Secretaries "fail[ed] . . . to respond promptly and appropriately to the comprehensive amendments developed by this Committee six years ago. . . . It is this unfortunate experience that is a major impetus for this bill.").

Congress's reaction was unequivocal. Disregarding the Executive's "strong[] oppos[ition]" (1994 Rep. 16), it passed a second extensive revision of the ISDA. Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, tit. I, 108 Stat. 4250 (1994 Amendments); *see* App. 12a-20a. The changes addressed familiar concerns, but with a new unwillingness to entrust any part of their resolution to secretarial discretion.

The original ISDA, for example, had required contracting Tribes to submit annual reports including "such . . . information as the appropriate Secretary may request." ISDA § 108, 88 Stat. 2212; App. 3a. The 1988 Amendments attempted to restrain the burdensomeness of such "request[s]" by requiring that they be made through public rulemaking. 1988 Amendments § 208, 102 Stat. 2296; App. 5a. In 1994, Congress simply specified one particular form of required audit. 1994 Amendments § 102(2), 108 Stat. 4250-4251 (codified at 25 U.S.C. § 450c(f)); App. 12a. Beyond that, the Secretary may collect additional information only to the extent he is able to "negotiate" such a requirement with the tribal contractor. *Id.*

Similarly, the 1988 Senate Report had indicated an intent that the Secretaries accept tribal proposals to contract for administrative functions, no matter at what organizational level the Secretary would have performed them. 1988 Rep. 23-24. The 1994 Amendments spelled the requirement out in statutory text—indeed, in two key places. *See* 25

U.S.C. § 450f(a)(1), as amended by 1994 Amendments § 101(5), 108 Stat. 4251 ("The programs, functions, services, or activities that are contracted . . . shall include administrative functions . . . without regard to the organizational level within the [federal] Department that carries out such functions.") (App. 13a); 25 U.S.C. § 450j-1(a)(1), as amended by 1994 Amendments § 102(14), 108 Stat. 4257 (contract funding "shall not be less than the . . . Secretary would have otherwise provided for the [contracted] operation . . . without regard to any organization level within the [federal] Department . . . at which the [operation] . . . , including supportive administrative functions that are otherwise contractable, is operated") (App. 16a).[10]

The 1994 Amendments also substantially tightened direct statutory control over the standards and process under which the Secretary may decline to enter into an ISDA contract proposed by a Tribe. *See* 1994 Amendments § 102(6)-(7) and (9), 108 Stat. 4251-4253 (amending or adding ISDA § 102(a)(2) and (4), (b)(3), and (e), codified as later further amended at 25 U.S.C. § 450f(a)(2) and (4), (b)(3), and (e)); App. 13a-15a. For example, the amended Act now requires the Secretary to base any such decision on "controlling legal

---

[10] These amendments addressed a particular source of frustration for Tribes seeking to contract for services: the practice of contracting only field-office operations, thereby protecting federal agency area-office and headquarters operations. Despite forceful discussion in the 1988 Senate Report specifically indicating that Tribes should be able to contract to perform all IHS functions related to a program, including functions performed at area offices and headquarters, *see* 1988 Rep. 23-24, the 1994 proposed regulations threatened to reinforce the historical practice. They defined the operative term "program" narrowly as the "operation of services for tribal members and other eligible beneficiaries," and asserted that "the legislative history . . . indicates that what Congress intended by the term program was the operation of services." 59 Fed. Reg. 3167 (Jan. 20, 1994); *see id.* at 3179, § 900.102. Although the regulations left open the theoretical possibility that some programs "might be performed at higher organizational levels," they "emphasize[d] that service delivery programs subject to contracting are generally performed at the reservation level." *Id.* at 3168; *see id.* at 3181, § 900.106(c).

authority" or on specific evidence "clearly" demonstrating a statutory ground for declination; to approve any severable portion of a proposal; and to carry "the burden of proof to establish by clearly demonstrating the validity of the grounds for declining." 25 U.S.C. § 450f(a)(2) & (4), (e)(1). Moreover, if a Tribe's contract proposal is declined in whole or in part—or if, as had happened in the past, the Secretary purports to approve a request, but then does not take the steps necessary to implement the contract—the Tribe may bypass any administrative appeal and proceed straight to district court, seeking "immediate injunctive relief to reverse a declination finding . . . or to compel the Secretary to award and fund an approved self-determination contract." 25 U.S.C. §§ 450f(b)(3) and 450m-1(a), as amended by the 1994 Amendments §§ 102(7) & 104(2), 108 Stat. 4252, 4268; App. 14a, 18a.

Perhaps most strikingly, Congress gave up waiting for the Secretaries to promulgate appropriate terms and conditions for ISDA contracts, and simply prescribed a statutory form of contract itself. *See* 1994 Amendments § 103, 108 Stat. 4260-4261 (enacting ISDA § 108, codified as later further amended at 25 U.S.C. § 450*l*); *see also* 1994 Rep. 3. In that prescribed form, it included a special and sweeping rule of construction:

> Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the . . . related functions, services, activities, and programs (or portions thereof) [listed in the Contract], that are otherwise contractable under section 102(a) of such Act [25 U.S.C. § 450f(a)], *including all related administrative functions*, from the Federal Government to the Contractor[.]

25 U.S.C. § 450*l*(c), sec. 1(a)(2) (emphasis added). Moreover, having settled these matters itself, Congress expressly stripped the Secretaries of any authority to "promulgate any

regulation, [or] impose any nonregulatory requirement, relating to self-determination contracts"—with the exception of one unified set of regulations, addressing only specified topics and vetted with Tribes through a "negotiated rulemaking" process, if but only if the final regulations were promulgated within 18 months (later expanded to 20 months) after enactment of the 1994 Amendments. *See* 1994 Amendments § 105, 108 Stat. 4269 (amending ISDA § 107, codified as later further amended at 25 U.S.C. § 450k); App. 19a-20a; *see also* 1994 Rep. 14 ("Beyond the areas specified . . . , no further delegated authority is conferred.").

In short, after the 1988 and 1994 Amendments, it would be difficult to find a context in which it would be *less* persuasive for the government to argue for any degree of deference to a federal Officer's exercise of discretion in the construction or implementation of a federal statute.

III. In Light Of The ISDA's History, Its Funding Provisions Cannot Be Construed To Make Reimbursement Of Tribal Contract Support Costs Depend On The Secretary's Discretionary Decisions Concerning The Funding Of Federal Administrative Costs

It is against this background that the Secretary now resists the Federal Circuit's conclusion that he is contractually bound to pay the contract support costs at issue in these cases. In doing so, he seizes on the only language he can in the ISDA: the "availability" and "reduction" clauses of 25 U.S.C. § 450j-1(b).

The Secretary's core argument is that the ISDA allows him to decide what amounts he needs for purposes of his own administrative establishment, and to treat only whatever is left over as "availab[le]" to fund both ISDA contracts and direct services to other Tribes. *See, e.g.*, 03-853 Pet. 24 (funds needed for Secretary's own functions not "meaningfully" available to satisfy ISDA contract obligations); *id.* at 26 (decision to use appropriated funds to pay for "federal functions" rather than contract obligations did not " 'reduce' funding to the Tribes" because the Secretary "never . . . treated [those funds] as available to pay for [contracted]

services . . . to begin with"). This is, in effect, an argument that the Secretary must have the discretion to make difficult trade-offs between tribal and federal administrative costs, in the context of overall budgetary constraints. *See id.* at 17 (both Secretary and Tribes must be "constrained by the . . . [Secretary's] need to allocate funds among competing needs"); 02-1472 Br. in Opp. 16 (" 'availability' should be read" to mean "practical availability," "in view of competing claims and priorities" as determined by the Secretary). Yet, as we have described, the whole history of the ISDA demonstrates beyond question that that is precisely the sort of decision that Congress has concluded it *cannot* safely entrust to the discretion of federal administrators.[11]

A. The Governmental Nature Of ISDA Contracts Does Not Undermine Their Enforceability

The Secretary argues in part that because ISDA contracts are "governmental funding arrangements," rather than "procurement contracts," they are "constrained by . . . the need to allocate funds among competing needs." 03-853 Pet. 17. In the Secretary's view, of course, he is the one to determine the necessary "allocat[ion]." There is, however, more than a little irony in the Secretary's invocation of the government-to-government nature of ISDA agreements as an argument to support limiting reimbursement of tribal administrative costs.

As the history discussed above demonstrates, in 1988 the Senate Indian Affairs Committee also stressed "the

[11] In *Ramah Navajo School Board, Inc.* v. *Babbitt*, 87 F.3d 1338, 1345-46 (1996), the D.C. Circuit considered an IHS formula for allocation of limited funds, which reduced the amount available to Tribes that missed an agency-imposed deadline for submitting contract requests. Rejecting an argument based in part on the availability clause, the court held that the Secretary had no discretion to impose the penalty formula, in light of Congress's "irritation" with the ISDA funding agencies' " 'failures to administer self-determination contracts in conformity with the law,' " and its consequent decision to deny the agencies any discretion with respect to ISDA contract funding. *Id.* at 1345.

unique nature of self-determination contracts between the Federal Government and Indian tribal governments." 1988 Rep. 18. The Committee was explaining why the Secretaries had erred in failing to exercise their discretion to exempt ISDA contracts from most federal procurement rules, instead replacing the "federal [Indian] service bureaucracy" with a "federal contract monitoring bureaucracy." *Id.* at 18-19. Congress's response to that federal administrative failure was to amend the statute itself to make clear that ISDA contracts are not "procurement" contracts, and that they should not be subjected to burdensome procurement rules. *See* pp. 12-13, *supra*. At the same time, although it considered changing the statutory term "contract" to something such as "intergovernmental agreement," the Committee ultimately retained the term "contract" because that term was "important to convey the sense of a *legally binding instrument*." 1988 Rep. 19 (emphasis added). Indeed, the 1988 Amendments added important provisions designed to confirm and enhance not only the mandatory inclusion of CSCs in the funding for ISDA contracts, but the *enforceability* of those contracts *as contracts*. *See* pp. 15-16, *supra*; 25 U.S.C. § 450m-1(a), (d). The Secretary's present argument for greater flexibility to *reduce* his obligations under ISDA "governmental funding arrangements" (03-853 Pet. 17), because of his own determinations about the need to maintain his own administrative apparatus, runs completely counter to Congress's intentions.

B. Congress Did Not Give Federal Administrators Discretion To Determine When Funds Are "Available" To Pay CSCs

There is no question that, in the years in question, Congress did not give the Secretary enough money to pay for everything he wanted in his own agency, while fully honoring his statutory and contractual commitment to fund petitioners' CSCs. The question is who bears the burden of that shortfall.

The Tribes argue, and the Federal Circuit held (*see* 03-853 Pet. App. 16a), that the Secretary was required to fulfill

his contractual obligations first—even if doing so required either cutting his own bureaucracy or seeking a further appropriation. The Secretary argues, to the contrary, that he was entitled to set funds aside for his "inherently federal" functions, before deciding how much remained "available" to pay for direct tribal services and ISDA contracts. *See* 03-853 Pet. 24-25; *see also* 02-1472 Br. in Opp. 15-17. Yet a major focus of Congress's dissatisfaction with the Secretaries' implementation of ISDA in 1988 was the Secretaries' "diversion of tribal contract funds to pay for costs incurred by the Federal government." 1988 Rep. 30. Accordingly, the 1988 Amendments required inclusion of CSCs and other indirect costs in determining contract funding, and specifically directed that such funding "*shall not be reduced* to make funding available for contract monitoring or administration by the Secretary"; "*shall not be reduced* by the Secretary to pay for Federal functions including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring"; and "*shall not be reduced* by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract." 25 U.S.C. § 450j-1(b) (emphasis added).

Similarly, the House Conference Report accompanying the Interior and IHS appropriations bill for 1995—one of the years at issue here—directed the IHS to consult with Tribes to "address the [federal] organizational changes needed, such as closing and consolidating area offices and delegating area office and headquarters functions to the field, to free up funding for additional self-governance compacts in fiscal year 1995 and beyond." H.R. Conf. Rep. No. 103-740, at 51 (1994). And in 1994, when it ran out of patience with the Secretaries and prescribed its own form of ISDA contract, Congress included the special rule of construction requiring that "each provision" of both the ISDA and the prescribed contract "shall be liberally construed . . . to transfer . . . funding and . . . related functions, services, activities, and programs . . . , *including all related administrative functions*,

from the Federal Government to the [tribal] Contractor." 25 U.S.C. § 450*l*(c), sec. 1(a)(2) (emphasis added).

Consistently, Congress's focus has been on transferring administrative functions to Tribes and reducing—not protecting—federal administration. *See also* pp. 11-14, 17-18, *supra*. The statute and its history make clear that contract support costs are non-discretionary items, and that Congress wants the Secretaries to fund tribal administration in preference to its own administrative operations. In that light, it is difficult to credit the Secretary's current argument that Congress intended the determination of what appropriated funds are "availab[le]" to fund contracts under 25 U.S.C. § 450j-1(b) to begin only after the Secretary has already made whatever he considers adequate provision for "federal functions." *See* 03-853 Pet. 24.

C. In The Absence Of Specific Congressional Action, The Risk Of A Shortfall In Overall Appropriations Should Be Borne By The Secretaries, Not By Tribes

In the end, the Secretary argues bluntly that the ISDA "place[s] the risk of insufficiency [of appropriations] *on petitioners*" and other contracting Tribes. 02-1472 Br. in Opp. 19. If that argument referred to congressional action specifically limiting appropriations for use in paying petitioners, or in funding CSCs, it might have more force—despite the expressly contractual nature of the government's obligations. But as petitioners demonstrate, the appropriations at issue in this case were not so limited. What the Secretary has in mind instead is the risk that his agency's overall appropriation may be insufficient, not to pay petitioner's CSCs, but to pay them while also paying for everything else that the Secretary considers an equal or higher priority.

In that regard, the Secretary is correct in noting at least the theoretical relevance of the ISDA's provision that "the Secretary is not required to reduce funding for programs . . . serving a tribe to make funds available to another tribe" through an ISDA contract. 25 U.S.C. § 450j-1(b). But the Secretary must bear the burden of showing—not just assert-

ing—that he has both properly invoked that provision, and demonstrated its applicability on a given set of facts. *Cf. id.* § 450f(e)(1). The better time for the Secretary to raise the reduction clause as an impediment to "mak[ing] funds available" to petitioners under the ISDA, in the amount otherwise required by the Act, would have been *before* he had contractually committed himself to pay the full amount, or otherwise at a time when the Tribe could still obtain a timely hearing, including judicial review, to explore the relevant factual and legal issues. *Cf. id.* § 450f(a)(2)(D) and (b), 450m-1(a). That was not done here. In any event, in this case the Federal Circuit considered this question and concluded that amounts the Secretary reserved for "inherently federal functions," and amounts unexpended at the end of the relevant years, "clearly [did] not fall under this restriction," and together were "more than sufficient" to allow the Secretary to pay petitioners' CSCs. 03-853 Pet. App. 32a. There is no reason for this Court to revisit that fact-bound determination.

More generally, under the Secretary's apparent logic, the risk of any overall shortfall in appropriations would fall first and foremost on ISDA contracting Tribes; then, in the Secretary's discretion, on the non-contracting Tribes benefiting from program funding that the Secretary is "not required" to reduce in favor of ISDA contract funding, 25 U.S.C. § 450j-1(b); and *only then* on any portion of the Secretary's own administrative funding. That hypothetical result is no less "absurd" than the one the Secretary posits if he is required to honor his ISDA contracts under the "availability" clause. *See* 03-853 Pet. 24. Indeed, preferring federal administrative funding to tribal funding in the manner that the Secretary advocates would plainly be *less* consistent with the congressional intentions expressed in the text and history of the ISDA.

Finally, placing the principal risk of appropriation shortfalls on the Secretary, rather than on ISDA-contract Tribes, is functionally appropriate. It is, after all, the Secretary who ultimately requests and receives appropriations from

BEST AVAILABLE COPY

Congress—and who has the best access to information concerning the full amount needed to fund his own necessary administrative functions, the services he provides to Tribes directly, and the services and administrative responsibilities that have been transferred to contracting Tribes under the ISDA. And putting the Secretary's administrative budget at some risk gives the agencies an incentive to act.[12]

Recognizing these realities, Congress in the ISDA required the Secretaries to provide annual reports concerning the need for funding—specifically including funding for contract support costs. 25 U.S.C. § 450j-1(c). (So far as the NCAI is aware, the Secretary has never complied with that requirement.) The Senate Indian Affairs Committee also repeatedly called on both Secretaries to request appropriations that would fully fund their obligations under the ISDA, and criticized them for not doing so. *See, e.g.*, 1988 Rep. 9, 14. Congressional appropriators urged reductions in federal adminsitrative costs, in order to free up funds to pay tribal CSCs. *See* p. 24, *supra*. And in the end, Congress enacted statutory provisions that clearly make the Secretaries' ISDA obligations judicially enforceable, specifically including through money damages or injunctions to compel payment of amounts due.[13] The clear import of the ISDA's pro-

---

[12] Indeed, once it became clear that Tribes might in fact enforce their ISDA rights, the agencies *did* go back to Congress. *See, e.g.*, 03-853 Pet. 20-23 (discussing Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-2688 (1998)). True to form, what they sought was protection for their own operations, rather than for contracting Tribes. Nonetheless, the agencies' interest in, and ability to procure, congressional action amply demonstrates the efficacy of the incentive created by the ISDA's mandatory funding and enforcement provisions. It also shows the relative advantage that the agencies have in obtaining specific decisions from Congress concerning how to rebalance future financial commitments, if and when it is necessary to do so.

[13] The Secretary has argued in passing (03-853 Pet. 22 n.9; 02-1472 Br. in Opp. 25 n.9) that money damages are not available to petitioners, because any appropriations have been exhausted and petitioners could not be paid from the Judgment Fund, 31 U.S.C. § 1304. As the Federal Cir-

visions and history is that, as between either Secretary and an ISDA Tribe, in the absence of some more specific congressional action, and so long as appropriations are legally "available" to satisfy contractual commitments under the ISDA, Congress placed the risk of any overall budgetary shortfall squarely on the Secretary—not the Tribes.

CONCLUSION

The judgment of the Tenth Circuit in No. 02-1472 should be reversed. The judgment of the Federal Circuit in No. 03-853 should be affirmed.

Respectfully submitted,

JOHN DOSSETT
GENERAL COUNSEL
NATIONAL CONGRESS OF AMERICAN INDIANS
1301 Connecticut Ave., N.W.
Suite 200
Washington, DC 20036

EDWARD C. DUMONT
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

JUNE 2004

---

cuit held, however, there was ample statutory authority for the agency to contract to pay petitioners' contract support costs—and Congress clearly made any such contract enforceable against the government. *See* 03-853 Pet. App. 34a-35a; 25 U.S.C. § 450m-1(a) (authorizing district courts to award "appropriate relief including money damages"), (d) (applicability of Contract Disputes Act); 41 U.S.C. § 612(a)-(b) (allowing for "judgments" and "monetary awards"). There is no reason that any award resulting from such a proceeding should not be payable in the ordinary course from the Judgment Fund—whether or not the Secretary presently has any resources that could lawfully be used to reimburse that Fund. The Contract Disputes Act expressly contemplates that agencies may need to seek supplemental appropriations in order to reimburse the Judgment Fund after losing a case. *See* 41 U.S.C. § 612(c) ("Payments made pursuant to subsections (a) and (b) shall be reimbursed to the fund provided by section 1304 of title 31, United States Code, by the agency whose appropriations were used for the contract out of available funds *or by obtaining additional appropriations for such purposes.*" (emphasis added)). In any event, in practice an agency "need not disrupt ongoing programs or activities in order to find the money [to reimburse the Judgment Fund]. If this were not the case Congress could have just as easily directed the agencies to pay the judgments and awards directly." General Accounting Office, 3 *Principles of Federal Appropriations Law*, ch. 12, at 78 (2d ed. 1994). Perhaps for that reason, most contract damages paid out of the Judgment Fund are never actually reimbursed. *See id.* ch. 13, at 20.

APPENDIX

TABLE OF CONTENTS

Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450 *et seq.*) 1a

The ISDA as amended by the Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 ..... 4a

The ISDA as amended by The Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, tit. I, 108 Stat. 4250 ..... 12a

APPENDIX

STATUTORY PROVISIONS

Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203. (Codified as amended at 25 U.S.C. §§ 450 *et seq.*)

* * * *

DECLARATION OF POLICY

SEC. 3. (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

* * * *

CONTRACTS BY THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

SEC. 103. (a) The Secretary of Health, Education, and Welfare is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to carry out any or all of his functions, authorities, and responsibilities under the Act of August 5, 1954 (68 Stat. 674), as amended: *Provided, however,* That the Secretary may initially decline to enter into

any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted for will not be satisfactory; (2) adequate protection of trust resources is not assured; or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: *Provided further*, That the Secretary of Health, Education, and Welfare, in arriving at his finding, shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance.

(b) Whenever the Secretary of Health, Education, and Welfare declines to enter into a contract or contracts pursuant to subsection (a) of this section, he shall (1) state his objections in writing to the tribe within sixty days; (2) provide, to the extent practicable, assistance to the tribe or tribal organization to overcome his stated objections; and (3) provide the tribe with a hearing, under such rules and regulations as he shall promulgate, and the opportunity for appeal on the objections raised.

* * * *

ADMINISTRATIVE PROVISIONS

SEC. 106. (a) Contracts with tribal organizations pursuant to sections 102 and 103 of this Act shall be in accordance with all Federal contracting laws and regulations except that, in the discretion of the appropriate Secretary, such contracts may be negotiated without advertising and need not conform with the provisions of the Act of August 24, 1935 (49 Stat. 793), as amended: *Provided*, That the appropriate Secretary may waive any provisions of such contracting laws or regulations which he determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of this Act.

* * * *

(h) The amount of funds provided under the terms of contracts entered into pursuant to sections 102 and 103 shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract: *Provided*, That any savings in operation under such contracts shall be utilized to provide additional services or benefits under the contract.

PROMULGATION OF RULES AND REGULATIONS

SEC. 107. (a) The Secretaries of the Interior and of Health, Education, and Welfare are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this title.

* * * *

REPORTS

SEC. 108. For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract or grant under this title, the Indian tribe which requested such contract or grant shall submit to the appropriate Secretary a report including, but not limited to, an accounting of the amounts and purposes for which Federal funds were expended, information on the conduct of the program or service involved, and such other information as the appropriate Secretary may request.

* * * *

The ISDA as amended by the Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285.

DECLARATION OF POLICY

[Section 102 of the 1988 Amendments, 102 Stat. 2285, amended ISDA Section 3(b). 25 U.S.C. § 450a (1988). The new language is shown in italics.]

SEC. 3 (b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, *individual Indian tribes and to* the Indian people *as a whole* through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from *the* Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. *In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.*

* * * *

REPORTING AND AUDIT REQUIREMENTS

[Section 208 of the 1988 Amendments, 102 Stat. 2296, amended ISDA Section 108 and redesignated it as section 5(f). 25 U.S.C. § 450c(f) (1988). New language is shown in italics.]

SEC. 5. (f) For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract or grant under this title, the Indian tribe which requested such contract or grant shall submit to the appropriate Secretary a report including, but not limited to, an accounting of the amounts and purposes for which Federal funds were expended, information on the conduct of the program or service involved, and such other information as the appropriate Secretary may request *through regulations promulgated under sections 552 and 553 of title 5, United States Code.*

* * * *

SELF-DETERMINATION CONTRACTS

[Section 201 of The 1988 Amendments, 102 Stat. 2288, combined ISDA Sections 102 and 103 into a new Section 102, with substantial revisions. 25 U.S.C. § 450f (1988). Italics are used to emphasize particular new material.]

SEC. 102. (a)(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended;

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended;

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract to the Secretary for review. The Secretary shall, within ninety days after receipt of the proposal, approve the proposal unless, within sixty days of receipt of the proposal, a specific finding is made that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured; or

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(b) Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing *on the record* and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate.

* * * *

CONTRACT FUNDING AND INDIRECT COSTS

[Section 205 of the 1988 Amendments, 102 Stat. 2292, added a new ISDA Section 106. 25 U.S.C. § 450j-1 (1988).]

SEC. 106. (a)(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act hall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which -

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3) Any savings in operation under a self-determination contract shall be utilized to provide additional services or benefits under the contract or be expended in the succeeding fiscal year as provided in section 8 of this Act.

(b) The amount of funds required by subsection (a) —

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to —

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c).

Notwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act.

* * * *

PROMULGATION OF RULES AND REGULATIONS

[Section 207 of the 1988 Amendments, 102 Stat. 2295, amended ISDA Sections 107(a) and (b). 25 U.S.C. § 450k (1988). The new language is shown in italics.]

SEC. 107. (a) The Secretaries of the Interior and of *Health and Human Services* are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this title: *Provided, however, That all Federal requirements for self-determination contracts and grants under this Act shall be promulgated as regulations in conformity with sections 552 and 553 of title 5, United States Code.*

* * * *

(b)(3) Within *seven* months from the date of enactment of *the Indian Self-Determination and Education Assistance Act Amendments of 1988*, the Secretary shall publish proposed regulations in the Federal Register for the purpose of receiving comments from tribes and other interested parties.

(4). Within ten months from the date of enactment of the *Indian Self-Determination and Education Assistance Act Amendments of 1988*, the Secretary shall promulgate regulations to implement the provisions of *such Act.*

CONTRACT APPEALS

[Section 206 of the 1988 Amendments, 102 Stat. 2294, added a new ISDA Section 110. 25 U.S.C. § 450m-1 (1988).]

SEC. 110 (a) The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder.

(b) Unless otherwise agreed to by the resolution of an Indian tribe, the Secretary shall not revise or amend a self-determination contract with such tribe.

(c) The Equal Access to Justice Act (Public Law 96-481, Act of October 1, 1980; 94 Stat. 2325, as amended), shall apply to administrative appeals by tribal organizations regarding self-determination contracts.

(d) The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts.

* * * *

The ISDA as amended by The Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, Tit. I, 108 Stat. 4250.

REPORTING AND AUDIT REQUIREMENTS

[Section 102(2) of the 1994 Amendments, 108 Stat. 4250, amended ISDA Section 5(f) to read as follows. 25 U.S.C. § 450c (1994).]

SEC. 5. (f)(1) For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract entered into, or grant made, under this Act, the tribal organization that requested such contract or grant shall submit to the appropriate Secretary a single-agency audit report required by chapter 75 of title 31, United States Code.

(2) In addition to submitting a single-agency audit report pursuant to paragraph (1), a tribal organization referred to in such paragraph shall submit such additional information concerning the conduct of the program, function, service, or activity carried out pursuant to the contract or grant that is the subject of the report as the tribal organization may negotiate with the Secretary.

(3) Any disagreement over reporting requirements shall be subject to the declination criteria and procedures set forth in section 102.

* * * *

SELF-DETERMINATION CONTRACTS

[Sections 102(5), (6), (7) and (9) of the 1994 Amendments, 108 Stat. 4252, amended ISDA Section 102 subsections (a), (b), and (e). 25 U.S.C. § 450f (1994). The new language is shown in italics.]

SEC. 102. (a)(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

* * * *

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, *or a proposal to amend or renew a self-determination contract,* to the Secretary for review. *Subject to the provisions of paragraph (4),* the Secretary shall, within ninety days after receipt of the proposal, approve the proposal *and award the contract* unless, *the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that —*

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a); or

(E) the program function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

* * * *

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal—

(A) proposes in part to plan, conduct or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or

(B) proposes a level of funding that is in excess of the applicable level under section 106(a),

subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 106(a). If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) shall only apply to the portion of

the contract that is declined by the Secretary pursuant to this subsection.

* * * *

(b) Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

* * * *

(3) provide the tribal organization with a hearing on the record *with the right to engage in full discovery relevant to any issue raised in the matter* and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, *except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 110(a).*

* * * *

(e)(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3), the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

* * * *

CONTRACT FUNDING AND INDIRECT COSTS

[Section 102(14) of the 1994 Amendments, 108 Stat. 4257, amended ISDA Section 106(a) to read in part as follows. 25 U.S.C. § 450j-1 (1994). The new language is shown in italics.]

SEC. 106. (a)(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, *without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.*

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of *an amount for* the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which -

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of —

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in

connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under section 106(a).

* * * *

CONTRACT APPEALS

[Section 104(2) of the 1994 Amendments, 108 Stat. 4268, amended ISDA Section 110(a) to read as follows. 25 U.S.C. § 450m-1 (1994). The new language is shown in italics.]

SEC. 110. (a) The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder *(including immediate injunctive relief to reverse a declination finding under section 102(a)(2) or to compel the Secretary to award and fund an approved self-determination contract).*

* * * *

PROMULGATION OF RULES AND REGULATIONS

[Section 105 of the 1994 Amendments, 108 Stat. 4269, amended ISDA Section 107 to read in part as follows. 25 U.S.C. § 450k (1994).]

SEC. 107. (a)(1) Except as may be specifically authorized in this subsection, or in any other provision of this Act, the Secretary of the Interior and the Secretary of Health and Human Services may not promulgate any regulation, nor impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts, except that the Secretary of the Interior and the Secretary of Health and Human Services may promulgate regulations under this Act relating to chapter 171 of title 28, United States Code, commonly known as the 'Federal Tort Claims Act', the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.), declination and waiver procedures, appeal procedures, reassumption procedures, discretionary grant procedures for grants awarded under section 103, property donation procedures arising under section 105(f), internal agency procedures relating to the implementation of this Act, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards, and financial management standards.

(2)(A) The regulations promulgated under this Act, including the regulations referred to in this subsection, shall be promulgated—

(i) in conformance with sections 552 and 553 of title 5, United States Code and subsections (c), (d), and (e) of this section; and

(ii) as a single set of regulations in title 25 of the Code of Federal Regulations.

(B) The authority to promulgate regulations set forth in this Act shall expire if final regulations are not promulgated

within 18 months after the date of enactment of the Indian Self-Determination Contract Reform Act of 1994.

* * * *

Supreme Court, U.S.
FILED
JUN 18 2004
OFFICE OF THE CLERK

(6) (4)

Nos. 02-1472 & 03-853

IN THE

Supreme Court of the United States

CHEROKEE NATION OF OKLAHOMA AND
SHOSHONE-PAIUTE TRIBES OF THE
DUCK VALLEY RESERVATION,
Petitioners,

v.

TOMMY G. THOMPSON, SECRETARY OF HEALTH
AND HUMAN SERVICES, ET AL.
Respondent.

On Writs of Certiorari
to the United States Courts of Appeals
for the Tenth and Federal Circuits

BRIEF OF *AMICUS CURIAE* SELDOVIA VILLAGE TRIBE IN SUPPORT OF PETITIONERS CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES

Of Counsel

CHARLES A. HOBBS
STEPHEN D. OSBORNE
HOBBS, STRAUS, DEAN
& WALKER, LLP
Washington, D.C.

GEOFFREY D. STROMMER *
JOSEPH H. WEBSTER
HOBBS, STRAUS, DEAN
& WALKER, LLP
806 SW Broadway, Suite 900
Portland, Oregon 97205
(503) 242-1745

June 18, 2004

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
GLOSSARY OF ACRONYMS	iii
INTEREST OF *AMICUS*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
BACKGROUND	4
ARGUMENT	6
I. The IHS Cannot Force a Tribe by Contract to Accept Less Contract Support Costs than the Tribe Is Entitled to by Statute	6
II. Because Indian Tribes Are the Intended Beneficiaries of the ISDA, the Rule that the Government May Not Benefit from Contract Provisions at Odds with the Statute Applies with Special Force	9
CONCLUSION	11
APPENDICES ATTACHED	
A. Opinion of Administrative Judge Bernard V. Parrette, Interior Board of Contract Appeals, No. 3862 and 3863/97 (Oct. 20, 2003)	1a
B. Indian Health Service, Supplemental Brief in Support of Summary Judgment, Interior Board of Contract Appeals, Nos. 3782-97 and 3862-97 (Sep. 8, 2003)	18a

TABLE OF AUTHORITIES

CASES — Page

Barrett Refining Corp. v. United States, 242 F.3d 1055 (Fed. Cir. 2001) 7

Beta Systems, Inc. v. United States, 838 F.2d 1179 (Fed. Cir. 1988) 8

Cherokee Nation of Okla. v. Thompson, 311 F.3d 1054 (10th Cir. 2002) 3

Chris Berg, Inc. v. United States, 426 F.2d 314 (Ct. Cl. 1970) 7

LaBarge Products, Inc. v. West, 46 F.3d 1547 (Fed. Cir. 1995) 7

MAPCO Alaska Petroleum, Inc. v. United States, 27 Fed. Cl. 405 (Fed. Cl. 1992) 6

Nautilus Shipping Corp. v. United States, 158 F. Supp. 353 (Ct. Cl. 1958) 7

Ramah Navajo School Board v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996) 10

Rough Diamond Co. v. United States, 351 F.2d 636 (Ct. Cl. 1965) 7, 8, 9

Thompson v. Cherokee Nation of Okla., 334 F.3d 1075 (Fed. Cir. 2003) 2, 3, 8

STATUTES

Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 ..... *passim*

Pub. L. No. 105-277, 112 Stat. 2681 (1998) 5

ADMINISTRATIVE OPINIONS

Craft Mach. Works, Inc. 90-3 B.C.A. 23,095 at 115,969, 1990 WL 133158 (ASBCA June 29, 1990) 7

Seldovia Village v. Thompson, IBCA Nos. 3862 & 3863/97 (Oct. 20, 2003) (Opinion by Administrative Judge Bernard V. Parrette, Appx.. A attached) 5, 6

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS — Page

Indian Self-Determination Memorandum (ISDM) 92-2 ..... *passim*

IHS, Supplemental Brief in Support of Summary Judgment, IBCA Nos. 3782-97 & 3862-97 (Sept. 8, 2003) (Appx. B attached) 3, 5

IHS Circular 96-04 5

GLOSSARY OF ACRONYMS

AFA	Annual Funding Agreement
CSC	Contract Support Costs
DHHS	Department of Health and Human Services
IBCA	Interior Board of Contract Appeals
IHS	Indian Health Service, an Agency of the DHHS
ISDA	Indian Self-Determination & Education Assistance Act
ISDM	Indian Self-Determination Memorandum
NCAI	National Congress of American Indians

BRIEF OF *AMICUS CURIAE* SELDOVIA VILLAGE TRIBE IN SUPPORT OF PETITIONERS CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES

INTEREST OF *AMICUS* [1]

Amicus Seldovia Village Tribe is a federally recognized Indian tribe, located in the lower Cook Inlet region of Alaska, that provides health care to eligible beneficiaries in its geographic area pursuant to the Indian Self-Determination and Education Assistance Act (commonly referred to as "ISDA"). This Act, and Seldovia's health care contractual agreement with the Department of Health and Human Services ("DHHS"), require the Indian Health Service ("IHS") to fund Seldovia's direct cost of providing health care, and also for all of its negotiated administrative costs related thereto (called "Contract Support Costs" or "CSC"), subject to "availability of appropriations."

The IHS has refused to pay Seldovia all of its CSC on the grounds that there are insufficient congressional appropriations "available." This legal issue is the same one that is involved in the instant cases before the Court, and the answer here will also determine the issue in Seldovia's case. However, even if the tribes win this main issue in the instant cases, the IHS has a fallback position that it argues will bar Seldovia's claim for underfunding. That is, that IHS need not pay damages to Seldovia because Seldovia supposedly *agreed* to

---

[1] All parties have consented to the filing of this brief, and their consents have been filed with the Clerk. No counsel for a party authored this brief in whole or part, and no person other than *amicus* made a monetary contribution to the preparation or submission of this brief, except that monetary contributions were or may be made by the Council of Athabascan Tribal Governments, the Bristol Bay Area Health Corporation, the Mississippi Band of Choctaw Indians, the Menominee Tribe of Indians of Wisconsin, and the Lac Courte Oreille Band of Chippewa Indians.

the underfunding. This fallback position is not involved in the instant case, but we call the Court's attention to it in the belief that the Court will find it at least of background relevance to its handling of the main issue in the instant case.

On October 20, 2003, the Interior Board of Contract Appeals ("IBCA") ruled that Seldovia is entitled to recover for the underfunding for 1996 and 1997; that Seldovia did not agree to the underfunding; and that even if it did, the IHS could not contractually force the Tribe to accept less than the full CSC the Tribe was entitled to by law. See Opinion, Appendix A attached. The IHS has appealed Seldovia's case to the Court of Appeals for the Federal Circuit, which has stayed the case to await the decision of this Court in the instant cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ISDA mandates the payment of contract support costs ("CSC") to Indian tribes that contract with the Secretary of the DHHS to provide health care services, subject only to "availability of appropriations."[2] In the instant cases before the Court, *Cherokee Nation and Shoshone-Paiute Tribes v. Thompson*, No. 02-1472, from the Tenth Circuit, and *Thompson v. Cherokee Nation*, No. 03-853, from the Federal Circuit, the Court will decide the main issue of whether the IHS's refusal to pay the full amount of tribes' CSC, on the grounds that insufficient appropriated funds were "available,"

[2] 25 U.S.C. § 450j-1(b). The provision of funds "is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." In this case no question arises of money being taken away from other tribes to fully fund Cherokee's or Seldovia's CSC. As the Secretary admitted, the IHS had leftover unexpended balances at the end of the pre-cap fiscal years available for reprogramming to meet the agency's contractual obligations. *Thompson*, 334 F.3d at 1094.

comported with the intent of Congress in the ISDA.[3] The Tenth Circuit upheld the IHS's interpretation of "available" in the ISDA, while the Federal Circuit rejected it.[4]

Amicus Seldovia fully supports the arguments of the Cherokee Nation and *amicus* National Congress of American Indians ("NCAI") on that main issue and will not reiterate those arguments here. The purpose of this brief is to call the Court's attention to a fallback argument that the IHS has made in the Seldovia case, and will make again in the event that it loses the instant cases.[5]

Even if the ISDA is interpreted as the Cherokee Nation argues, so that the Tribe is entitled to full CSC funding, the IHS will argue that Seldovia (and other similarly situated tribes) is still not entitled to full CSC funding because the Tribe's *Annual Funding Agreements* refer to an IHS document (ISDM 92-2) which declares IHS's policy to underfund tribes' CSC if the congressional committees fail to specifically earmark sufficient funds to meet all CSC requirements. This scenario occurred in 1996 and 1997, when the committees were silent. But Congress did not indicate any intention to underfund CSC *in the IHS appropriations Acts*, and IHS appropriations were therefore "available." The IBCA found in Seldovia's case that because funds were in fact "available," the IHS's policy to underfund based on committee action (not Congress's action) was its own doing, not Congress's. In addition, the IBCA held that Seldovia could not be forced to

[3] The ISDA provides that "Each provision of the [ISDA] . . . shall be liberally construed for the benefit of the [tribal] Contractor. . . ." 25 U.S.C. § 450*l*-(c). See also discussion of full legislative history in the amicus brief of The National Congress of American Indians.

[4] *Cherokee Nation of Okla. and Shoshone-Paiute Tribes v. Thompson*, 311 F.3d 1054 (10th Cir. 2002); *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003).

[5] The Government argument on this fallback issue is printed below at Appx. B.

agree to contract terms contrary to Congress's intention that CSC be fully funded, at least not when appropriations were "available."

If this Court is going to rule in favor of the Cherokee Nation on the main issue, as Seldovia hopes, it will likely be on the ground argued by the Cherokee Nation—that given "available" funds, Congress intended that tribes be paid their full CSC requirements. If Congress intended that tribes be paid their full CSC requirements, then any IHS policy inconsistent with that must be ineffective, even if embodied in an Annual Funding Agreement. The IHS may not rely on its own policy pronouncement to shirk its duty to pay full CSC or to impose contract terms that are contrary to Seldovia's right to full funding granted by Congress, see discussion below.

BACKGROUND

For *seven years*, Seldovia has been pursuing full payment of its CSC for fiscal years 1996 and 1997. In 1995, Seldovia and the Office of Cost Allocation in DHHS agreed that Seldovia was entitled to a higher CSC rate. In January 1996, Seldovia submitted to the IHS (an agency of DHHS) its proposed amendments to its FY 1996 Annual Funding Agreement to reflect the higher CSC need in the new negotiated rate. The IHS refused to incorporate the amendment because, it claimed, no funds were "available" to pay for the agreed increases, even though the IHS had discretionary funds available that could properly have been spent for this purpose.

In June 1997, Seldovia filed appeals with the IBCA of decisions by the contract officer denying the Tribe's claims for unpaid CSC in the amount of $126,439 in each of FYs 1996 and 1997. The IBCA decided the main issue in Seldovia's favor (that Congress intended tribes' CSC needs to be fully funded, if necessary out of discretionary portions of

the IHA appropriation).[6] The Board also rejected the IHS's fallback argument (that Seldovia's Annual Funding Agreement contractually waived the benefit of the main holding). The IHS had argued that it had an unpromulgated internal agency guideline for underfunding CSC payments to tribes, namely Indian Self-Determination Memorandum (ISDM) 92-2.[7] This document set forth the agency's determination that CSC allocations to tribes would be limited in the following manner: "If funds *available* in the Area's indirect cost base are not adequate to meet total requirements, then the amount *available* shall be distributed according to each contractor's proportion of total need." ISDM 92-2 § 6 (emphasis added).

ISDM 92-2 did not define the term "available," but the IHS asserted in its brief that the only funds available to fund Seldovia's indirect cost increase were those which the agency had "allocated to the Alaska Area for its indirect cost base." IHS Supplemental Brief before the IBCA (Appendix B) at 25a. This allocation, in turn, depended on "the distribution to the IHS Areas of the CSC funds earmarked in the appropriation committee reports for fiscal years 1996 and 1997." *Id.* at 24a. "The [sic] were no new funds allocated to the Area's indirect cost base" pursuant to the appropriation committee's recommendations in those fiscal years,[8] so, pursuant to ISDM

---

[6] See IBCA Opinion at Appx. A below.

[7] Successor policy documents provided similar guidance for allocating funding in the face of what the agency felt were CSC shortfalls due to lack of "available" funds. *See* IHS Circular 96-04 at 13. The Seldovia case, like the instant cases before this Court, involves the years before Congress, in FY 1999, began placing statutory caps on CSC funding in each year's appropriation bill. *See, e.g.*, Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-278 to 2681-279 (1998).

[8] Appx. B at 25a. The Board noted that in both of the years involved, the IHS failed to request adequate CSC to cover the existing shortfalls. Appx. A at 10a.

92-2, the IHS policy was not to compensate Seldovia for its full CSC. Since ISDM 92-2 was cross-referred to in the Annual Funding Agreement, the IHS argued that this policy was agreed to by Seldovia.[9]

The IBCA rejected the IHS's argument, and held that the language referring to ISDM 92-2 in the Annual Funding Agreement reflected the IHS's position about the applicability of ISDM 92-2 and not an agreement with Seldovia, and that, in any event, even if Seldovia had specifically agreed to it, the IHS could not force Seldovia to accept less than what Congress had intended be paid under the ISDA. Appx. A at 12a-16a.

ARGUMENT

I. The IHS Cannot Force a Tribe by Contract to Accept Less Contract Support Costs than the Tribe Is Entitled to by Statute.

In *MAPCO Alaska Petroleum, Inc. v. United States*, 27 Fed. Cl. 405 (Fed. Cl. 1992), the Court of Federal Claims held that the United States could not force a contractor to abide by a contract provision contrary to the law. In *MAPCO*, the Government's contract to buy fuel from a petroleum company contained an economic price adjustment ("EPA") clause contrary to the Federal Acquisition Regulations ("FARs"). Had the Government complied with the FARs provision, it would have paid the contractor a higher amount than it paid under the contract term. The Government argued that MAPCO waived its right to protest the contract

[9] The Annual Funding Agreement provided: "[t]he parties have not agreed on the amounts to be paid or the method and process for calculation and payment of contract support costs under the AFA. . . . It is the position of the IHS that any payment of or calculation of contract support costs shall be made in accordance with" ISDM 92-2 or its successor. Despite this plain language, the IHS insisted that Seldovia had acquiesced contractually to ISDM 92-2 and thus to underpayment of CSC. Appx. B at 21a.

by acquiescing to the Government's insistence on the EPA clause.

The court held the EPA portion of the contract unenforceable and invited MAPCO to submit documentation of damages, despite the fact that MAPCO had agreed to the EPA clause in the contract. The court explained, "'When a contract clause drafted by the Government is inconsistent with law, whether the [contractor] inquired, protested, accepted or otherwise assumed any risks regarding the same is not controlling; the impropriety will not be allowed to stand.'" *Id.* at 416 (quoting *Craft Mach. Works, Inc.*, 90-3 B.C.A. 23,095 at 115,969, 1990 WL 133158 (ASBCA June 29, 1990)). The *MAPCO* court's decision accords with the well-established principle that when a government contract is inconsistent with the law, the other party is not bound to that inconsistency by estoppel, acquiescence or failure to object, and is entitled to what the statute or regulation requires of the government.[10]

[10] *See Chris Berg, Inc. v. United States*, 426 F.2d 314, 317 (Ct. Cl. 1970) (granting a contractor reformation of the contract to provide an additional $41,000 despite the fact he signed and performed the contract as bid, where the contract provision violated the Armed Services Procurement Regulations); *Barrett Refining Corp. v. United States*, 242 F.3d 1055, 1061 (Fed. Cir. 2001) (affirming Court of Federal Claims' grant of *quantum valebant* relief when standard government price adjustment clause held to violate the FARs); *Rough Diamond Co. v. United States*, 351 F.2d 636, 640 (Ct. Cl. 1965) (discussing principle that when contractor is intended beneficiary of the statute, contract provision contrary to statute cannot stand); *Nautilus Shipping Corp. v. United States*, 158 F. Supp. 353, 355 (Ct. Cl. 1958) (when the Government imposed an additional charge on the buyer of a U.S. ship in violation of the statutory price formula in the Merchant Ship Sales Act, "One does not irrevocably subject himself to an improper charge by estoppel or acquiescence or mistake or ignorance of law or failure to protest."); and *LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1552 (Fed. Cir. 1995) (contract reformation available despite contractor's initial compliance with the contract provision later shown to be illegal).

Just as the Government sought to apply the illegal EPA clause in *MAPCO*, the IHS seeks to apply ISDM 92-2 to reduce Seldovia's CSC recovery despite the ISDA's mandate of full CSC payment, as recognized by the Federal Circuit in the *Thompson* case, and by the IBCA in Seldovia's case. ISDM 92-2 purported to limit "available" funds for payment of Seldovia's CSC shortfalls to the amount allocated by the IHS solely to the Alaska Area for its indirect cost base. ISDM 92-2 § 6; Appendix B below at 25a.

However, in *Thompson* the Federal Circuit held that "available funds" include all funds available in a lump sum appropriation that the Secretary has the authority to reprogram, other than funds committed directly to other tribes by the IHS, see note 2 above, and that in the years at issue in the case the Secretary had ample available funds to reprogram. 334 F.3d at 1088, 1094. The Court also held that "an agency is *required* to reprogram if doing so is necessary to meet debts or obligations. In other words, '[i]n some situations, the agency's discretion may rise to the level of a duty.'" *Id.* at 1086 (internal citations omitted, emphasis in original). If *Thompson* was correctly decided, as Seldovia believes, then ISDM 92-2 is inconsistent with the law, so a contract provision that attempts to apply ISDM 92-2 is unenforceable. When a contract clause violates the law, "the government can not, by law, benefit from it."[11]

[11] *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1185 (Fed. Cir. 1988); *Rough Diamond Co. v. United States*, 351 F.2d 636, 639-40 (Ct. Cl. 1965).

II. Because Indian Tribes Are the Intended Beneficiaries of the ISDA, the Rule that the Government May Not Benefit from Contract Provisions at Odds with the Statute Applies with Special Force.

The principle that a contractor is not bound by contract terms that violate a statute applies with special force when the contractor is part of a group the statute is designed to protect. *Rough Diamond Co. v. United States*, 351 F.2d at 639-40. In *Rough Diamond*, the court cited several ship sale cases holding that the Government could not vary the terms prescribed by the Merchant Ship Sales Act even though the buyers freely agreed to the unlawful terms; buyers were awarded the excess amounts paid. *Id.* at 639. Because the ship purchasers were the direct beneficiaries of Congress's concern in passing the statute, the government agency was not free to force the contractor to agree to a circumvention of the legislative intent. *Id.* at 640.[12]

Similarly, and as set forth in more detail in the Cherokee Nation's brief and NCAI's *amicus* brief, tribes are the direct beneficiaries of the legislative concerns that resulted in Congress enacting and amending the ISDA, which includes language spelling out the explicit right of tribes to be paid CSC. Where the ISDA's terms are explicit and provide "overwhelming evidence that Congress intended the [ISDA]

[12] By contrast, in *Rough Diamond* itself, the court found that the Agricultural Trade Development and Assistance Act of 1956, 7 U.S.C. § 1692, was intended primarily to benefit farmers, not the plaintiff commodity traders, so the Secretary of Agriculture could charge the traders a price higher than the "competitive world prices" referenced in the statute, particularly as the statute specifically authorized acceptance of higher bids. 351 F.2d at 642.

to limit the Secretary's discretion in funding matters,"[13] the IHS is not free to deviate from those terms by forcing the contractor to agree to the deviations.

The Seldovia case makes clear that the IHS will continue to actively and vigorously seek to circumvent the Federal Circuit's statutory ruling in *Thompson* one contract at a time, arguing that any ISDA agreement referring to ISDM 92-2 gives the agency the right to ignore the statute and pay less than full CSC to the Tribe. However, as demonstrated above, and as properly held by the IBCA in Seldovia's IBCA case, if the Federal Circuit's decision in *Thompson* is upheld, tribes must be paid the full CSC funds to which the ISDA entitles them, despite the Agency's assertion that a contract provision referencing an unpromulgated internal guideline trumps the statute.

[13] *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338, 1347 (D.C. Cir. 1996); *id.* at 1344 ("Congress left the Secretary with as little discretion as feasible in the allocation of [CSC]").

CONCLUSION

We respectfully suggest that the Court, as it resolves the main issue of whether the IHS's narrow interpretation of "available" in the ISDA was consistent with the intent of Congress in situations such as those at bar, be aware of IHS's fallback argument on a related issue not directly presented here; *viz.*, that the IHS can circumvent Congress's intent by forcing contractors to agree to the circumvention.

Respectfully submitted,

Of Counsel

CHARLES A. HOBBS
STEPHEN D. OSBORNE
HOBBS, STRAUS, DEAN
& WALKER, LLP
Washington, D.C.

GEOFFREY D. STROMMER *
JOSEPH H. WEBSTER
HOBBS, STRAUS, DEAN
& WALKER, LLP
806 SW Broadway, Suite 900
Portland, Oregon 97205
(503) 242-1745

June 18, 2004

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
Interior Board of Contract Appeals
801 N. Quincy St. Suite 300
Arlington, VA 22203

703 235 3813 703 235 1281 (fax)

APPEALS OF SELDOVIA VILLAGE TRIBE

Decided: October 20, 2003

IBCA 3862 & 3863/97

Compact No. 58G950029-01-2
FY 1996 and 1997 Funding Agreements
Indian Health Service, HHS

Appellant's Motion for Summary Judgment Granted; Government's Motions for Summary Judgment and to Dismiss Denied

APPEARANCE FOR APPELLANT:

Geoffrey D. Strommer, Esq.
Hobbs, Straus, Dean & Walker, LLP
Portland, Oregon 97204

Joseph H. Webster, Esq.
Hobbs, Straus, Dean & Walker, LLP
Washington, DC 20006

APPEARANCE FOR GOVERNMENT:
Duke McCloud, Esq.
Chief, IHS Branch, HHS
Rockville, Maryland 20857

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

Seldovia Village Tribe (Appellant or the Tribe) of Alaska has appealed two reductions in payments by the Indian Health Service (IHS) under the Tribe's FY 1996 and FY 1997 Annual Funding Agreements (AFA's). Appellant alleges that IHS failed to pay the Tribe its full contract support costs (CSC's) of $126,439 in each of those years, amounts not in dispute. IHS contends that the CSC reductions were the result of inadequate appropriations by the Congress, and avers that the Tribe's CSC reductions were both proper and proportionately the same as those experienced by other CSC recipients.

The appeals were filed in June 1997 and assigned to Judge Cheryl Rome, who is no longer with the Board. They were deferred for Board consideration because the issue of the propriety of CSC reductions was already before the Board in similar case, Cherokee Nation, which was ultimately reviewed by Court of Appeals for the Federal Circuit. *See* Appeals of *Cherokee Nation of Oklahoma*, IBCA 3877-79, 99-2 BCA 30,462; reconsideration granted at 01-1 BCA 31,158; decision unchanged at 01-1 BCA 31,349 (hereafter "Cherokee"). The Board's decision was affirmed in *Thompson v. Cherokee Nation of Oklahoma*, 334 F. 3d 1075, 2003 U.S. App., LEXIS 13483. Familiarity with *Thompson* is presumed for the purposes of this opinion.

Further information on IHS's Title III Self-Determination program can be found in *Shoshone-Bannock Tribes v. HHS*, 279 F. 3d 660 (9th Circuit 2002) and in *Cherokee Nation v. Thompson*, 311 F. 3d 1054 (10th Circuit 2002). Both Circuits have decided appeals similar to this one in favor of the Government rather than the appellant. This Board, however,

agrees with the decision of the Federal Circuit in *Thompson*, which is binding for us in any event.

Appeal Background

The present Appeals were filed pursuant to the Indian Self-Determination and Education Assistance Act (ISDA or the Act), which authorizes IHS to award to tribal organizations the same amounts that IHS would have spent in providing services to them, in order to enable the tribes to administer the programs themselves. Under Title III of the Act, the Secretary of HHS enters into Compacts with tribes to provide these funds, known as Secretarial funds, to enable them to provide health services to eligible Indians pursuant to Annual Funding Agreements. In addition, the tribes are entitled to funds to cover the administrative costs of the programs, called contract support costs, based on a rate arrived at through negotiation between the tribe and the cognizant Federal agency. The only limitation on the resulting CSC funding is that the funds must come out of, and may not exceed, available appropriations.

During the years in question, IHS experienced shortfalls in the amounts recommended by the Congressional Appropriations Committees for CSC use, even though total ISDA appropriations were increasing each year. These reductions were not incorporated into the legislation itself but were only Committee recommendations. Nevertheless, IHS treated them as mandatory directives and apportioned the funds as recommended, despite the fact that the entitlement to full CSC funds was arguably required under 25 U.S.C. sec. 450j-l(a) and that adequate funds for CSC purposes were available under the ISDA general appropriation.

Although the present Appeals predated *Thompson* and involve the same issues, IHS argues here that because the tribe's AFA's expressly provided that funding was to be in accordance with IHS's existing policy memorandum, which

called for the allocation of funds only within the limits of the Appropriation Committee's recommendation, full CSC payments were not required. Thus, IHS believes that the facts in this case differ from those in *Thompson*, and that *Thompson* is inapplicable. Appellant challenges this view, and both parties have moved for summary judgment.

These issues have been briefed at great length. Despite the Government's extensive arguments to the contrary, we hold that these appeals are within the ambit of *Thompson* and grant summary judgment for the reasons set forth in that decision. However, because they involve issues of first impression with respect to the Alaska tribes, it may be useful to set forth the general background of the Appeals as provided by Appellant in its Summary Judgment Motion. We will then address IHS' contention that Seldovia legally contracted away its entitlement to full CSC payments when it signed its Annual Funding Agreements.

Contract Background

A. *History of Title III Compacting*

The Indian Self-Determination and Education Assistance Act (ISDA), Pub.L. 93-638, 88 Stat. 2206 (Jan. 4, 1975), 25 U.S.C. § 450 *et seq.* was enacted by Congress in 1975, and has since been amended on a number of occasions. The ISDA allows tribes or tribal organizations to enter into agreements with the IHS to administer programs, functions, services or activities (PFSAs) which the IHS has operated for Indian tribes and their members. As originally enacted, the only mechanism for tribes to assume such PFSAs was through Title I contracts, which limited the flexibility of tribes to administer programs to accommodate unique local circumstances.

Thus, in 1988 Congress enacted Public Law 100-472, which formally established the Tribal Self-Governance Demonstration Project (Title III), 25 U.S.C. § 450f note. Title III

directed the Secretary of the Interior to initiate the Project as a five-year experiment involving up to 20 tribes. Under this Project, participating tribes were given the option of negotiating compacts and annual funding agreements (AFA's) with the Secretary of the Interior for the operation of DOI programs for Indians. In accordance with such compacts, tribes are authorized to administer such PFSA's and receive funds from all levels of the agency to perform these responsibilities—funds that the Secretary otherwise would have spent to perform the PFSAs. In addition to these "Secretarial funds," tribes are also entitled to CSC funds to cover the administrative costs of operating the programs.

The AFA, which is to be negotiated as part of a compact and re-negotiated each year, establishes the funding levels for operating the programs in the compact. With certain limitations, tribes are authorized to redesign and reallocate program funds on the basis of tribal priorities.

On December 4, 1991, President Bush signed the Tribal Self-Governance Demonstration Project Act, Public Law 102-184, into law. Among other things, this Act amended Public Law 100-472 to establish an Indian Health Service Self-Governance Demonstration Project and directed IHS to study the feasibility of expanding the Project to IHS programs and services. In 1992 Congress again amended Title III by enacting Section 314 of the Indian Health Amendments of 1992.[1] The 1992 amendments authorized the Secretary of the Department of Health and Human Services (HHS) to negotiate Self-Governance compacts and AFAs with tribes that had completed the required planning activities.

B. *The Alaska Tribal Health Compact*

In 1994, 13 tribes and tribal organizations in Alaska negotiated and signed the Alaska Tribal Health Compact (ATHC)

[1] Public Law 102-573.

and AFAs authorizing them to operate health care programs under Title III in fiscal year 1995. The ATHC was subsequently signed by the Director of IHS on behalf of the Secretary of HHS. The ATHC and AFAs went into effect on October 1, 1994, after having been filed with the Congress for review by the Senate Committee on Indian Affairs and the House Committee on Natural Resources, and other affected tribes, as required by law.

Since 1994, a number of other tribes and tribal organizations in Alaska have become co-signers of the ATHC and have negotiated AFAs thereunder, including the Public Law 102-573. Appellant Seldovia Village Tribe. To date, 18 tribes and tribal organizations from throughout Alaska are signatories to the ATHC. As a result, the vast majority of the IHS programs in Alaska are currently operated under tribal administration in accordance with the provisions of Title III and the ATHC.

C. *Calculation of Contract Support Costs*

The Indian Self-Determination Act requires the Secretary to pay full contract support cost funding to a contracting or compacting tribe in addition to the Secretarial amount for direct program funding. 25 U.S.C. 450j-l(a)(2); CSC funds "cover the full administrative costs the Tribe will incur—and which, absent the self-determination contract, the Federal government would incur—in connection with the operation of [direct Indian] programs." *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338, 1341 (D.C. Cir. 1996); *see also* 25 U.S.C. § 450b(f).

One aspect of CSC is "indirect costs." The ISDA defines these as "costs incurred for a common or joint purpose benefitting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved;" 25 U.S.C. § 450b(f). The amount of indirect costs

to which a tribal contractor is entitled is based upon a rate which is "arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency." 25 U.S.C. § 450b(g). The ISDA provides that funds for all such CSC "*shall be added*" to the tribe's contract. 25 U.S.C. § 450j-l(a)(2)(emphasis added). The only limitation is that all funding is "subject to the availability of appropriations." 25 U.S.C. § 450j-l(b).[2]

D. *Use of ISDM 92-2 to Distribute Contract Support Funds*

IHS utilizes ISDM 92-2,[3] an unpromulgated, internal agency guideline, to determine and allocate "contract support funds for all Public Law (P.L.) 93-638 contracts." ISDM 92-2 at 2 (Appt. Exh. H). Through this mechanism, the IHS limits the availability of CSC funding for ongoing contracts and compacts to a predetermined amount based on the level of prior year CSC funding to each Area Office. In the case of ongoing contracts, ISDM 92-2 (pg. 7) provides:

> The amount of indirect contract support funds representing the previous year's base will be distributed to Areas "recurring" [4] to fund each Area's indirect cost need. Each contractors' need for indirect contract

---

[2] As noted by the court in *Shoshone-Bannock Tribes v. Shalala*, 988 F. Supp. 1306, 1329 (D. Or. 1997), "CSC are automatically awarded as a percentage of the tribe's Secretarial Amount, but funding is 'subject to the availability of appropriations' and the Secretary's need to serve non-contracting tribes."

[3] In 1996, ISDM 92-2 was superseded by ISDM 96-04, which is consistent in relevant parts with its predecessor. However, for purposes of this appeal, ISDM 92-2 was the applicable guideline at the time that the Tribe entered into both its FY 1996 and FY 1997 AFAs from p. 8a.

[4] ISDM 96-04 (pg. 2) defines "recurring funds" as "Contract or compact funds that do not require rejustification each year to the Secretary. Annual increases are provided through congressional mandatory increases or other resource allocation methodologies applicable to the respective funding category of the award."

> support shall be determined by calculating changes, if any, in indirect cost rates, bases, and pools. If funds **available** in the Area's indirect cost base are not adequate to meet total requirements, then the amount **available** shall be distributed according to each contractor's proportion of total need. *These funds will be awarded to the contractor as non-recurring funds*, (underline in original, bold added).

The term "available" is not defined by ISDM 92-2. However, historically IHS has only increased the funds "available" for CSC to the extent that such an increase is recommended in the Conference Committee Report that accompanies the IHS' annual appropriation. Thus, this limitation on the funds available for CSC is not based upon any statutory mandate, but is only based upon Committee *recommendations*.

E. *Congressional Appropriations for the IHS*

The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) appropriated the following lump-sums for the Indian Health Service for FY 1996:

> *For expenses necessary to carry out* the Act of August 5, 1954 (68 Stat. 674), the *Indian Self Determination Act*, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,747,842,000, *together with payments received during the fiscal year pursuant to 42 U.S.C, 300aaa-2 for services furnished by the Indian Health Service*." (*emphasis added*).

Of the IHS' lump-sum appropriation of $1,722,842,000 for FY 1996, non-earmarked funds totaled $1,364,937,000. Similarly, the FY 1997 Appropriations Act provided:

> *For expenses necessary to carry out* the Act of August 5, 1954 (68 Stat. 674), the *Indian Self Determination Act*,

> the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,806,269,000, *together with payments received during the fiscal year pursuant to 42 U.S.C. 238(b) for services furnished by the Indian Health Service* (*emphasis added*).

Omnibus Consolidated Appropriations Act for FY 1997, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). Thus, the FY 1997 Act is nearly identical to the FY 1996 Act except that Congress increased the Indian Health Service's lump-sum appropriation by nearly 60 million dollars to $1,809,269,000. Of this total, non-earmarked funds totaled $1,408,736,000.

Nowhere is there any suggestion in the plain language of the FY 1996 and FY 1997 Appropriations Acts that Congress intended to impose a spending cap on CSC funds.[5] Only in the Committee reports is the issue of total funding for CSC addressed and there the Committee simply makes a recommendation. Neither the report nor the recommendation rises to a binding duty. The FY 1996 Report states:

> *Contract Support Costs.* —The Committee recommends $153,040,000 for contract support costs including decreases of $11,864,000 for pay and fixed costs and $3,770,000 for support cost shortfalls." H. R. Rep. 104-173, at 97 (1995) (emphasis added); see also S. Rep. 104-125, at 94 (1995).

---

[5] The plain language of the Appropriation Acts must control. *See Idaho First Nat'l Bank v. Commissioner of Internal Revenue*. 997 F.2d 1285, 1289 (9th Cir. 1993) ("[I]f the [statutory] language . . . is unambiguous, and its literal application does not conflict with the intentions of its drafters, the plain meaning should prevail."); *Environmental Defense Fund v. Reilly*, 909 F.2d 1497,1502 (D.C. Cir. 1990) (the starting point of statutory construction is "the language of the statute itself and absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive").

The FY 1997 Report states:

> *Contract support costs.—The* Committee recommends $160,660,000 for contract support. This amount includes increases over the fiscal year 1996 enacted level of $120,000 for the staffing of new facilities and $7,500,000 for the Indian self-determination fund." S. Rep. 104-319, at 90 (1996)(emphasis added); see also H. R. Rep. 104-625 (1996).

F. *IHS Budget Requests for CSC*

In both FY 1996 and FY 1997, the IHS failed to request adequate CSC to cover the existing shortfall. For FY 1996, the IHS requested $161,174,000, an increase of $15,714,000 over the previous year. However, as of the end of FY 1995, the CSC shortfall was approximately $43 million. As of March 30, 1996, the CSC shortfall just for new and expanded contracts was over $25 million. *Shoshone-Bannock*, 988 F. Supp. at 1329.

For FY 1997, the IHS requested significantly more for CSC—$200,955,000, an increase of $46,115,000—but still far short of the then existing CSC need. As of the end of FY 1996, the IHS had a CSC shortfall of approximately $62 million. Further, the IHS separately reported to Congress that its total CSC shortfall for FY 1997 was $81,956,000. See IHS CSC Annual Shortfall Report to Congress for FY 1997 (Sep. 24, 1997), at 3. Thus, the IHS requested almost $36 million less than it acknowledged was necessary to fully fund its CSC need for FY 1997.

G. *Background of the Seldovia Village's Claim*

In 1995, the Tribe and the Office of Cost Allocation, Department of Health and Human Services, negotiated an indirect cost rate of 47.3 percent for FY 1996 and FY 1997. Proposed Amendments 2 & 3 to FY 1996 AFA (with attached IDC Agreement). Based upon this rate, the Tribe's CSC need for both years was $247,696.

On January 24, 1996, the Tribe submitted to the IHS proposed amendments 2 and 3 to the FY 1996 AFA. Among other things, these amendments would have adjusted the funding in the FY 1996 AFA to provide for the payment of indirect costs under the negotiated indirect cost rate of 47.3 percent in accordance with the terms of the AFA. Section 4(B) of the FY 1996 AFA provides for the payment of contract support funds for indirect costs under section 106(a)(2) of the Act and Indian Self-Determination Memorandum No. 92-2.[6] The amount requested by the Tribe was determined based on the policies in ISDM 92-2.

At a meeting between tribal and IHS representatives held on December 3, 1996, the IHS tentatively responded that no action had been taken by the IHS on the amendments submitted almost a year earlier and that consequently these amendments were not incorporated into the FY 1996 AFA. On December 10, 1996 the Area Office, after further file review, confirmed that "we find that neither the Area [Office] nor IHS Headquarters processed the proposed amendments when received."

While the IHS agreed that $247,696 was the Tribe's CSC need, it stated that only $121,257 was available for CSC. Based upon this lack of "available" funds, the IHS did not incorporate the amendment into the Tribe's FY 1996 or FY 1997 AFA's. Instead, the IHS simply noted that it "did not have contract support cost shortfall funding available to meet [the Tribe's] needs at the time the amendment was first proposed, nor does it have those funds now." Similarly, the Final Contracting Officer's Decision seeks to justify the failure of the IHS to pay the Tribe's CSC requirement by stating that "the Alaska Area IHS did not have any new funds to award for the IDC rate change." As a result, the Tribe

---

[6] The AFA provides that ISDM No. 92-2 shall apply if no revisions of this memorandum is in effect by October 1, 1995, which was the case.

suffered a CSC funding shortfall of $126,439 in both FY 1996 and FY 1997.

Although not clearly stated, the IHS's position that no funds were available was apparently based upon its process for determining available funds for CSC under ISDM 92-2, through which the IHS generally only increases its allocation of funds for CSC if the Conference Committee recommends such an increase in report language. Thus, although Congress increased the IHS' budgets for FY 1996 and FY 1997 by tens of millions of dollars in non-earmarked funds each year, the position of the IHS seems to be that these and other non-mandatory funds were not "available" for CSC.

Positions of the Parties

The Government argues that even if it accepts the *Thompson* decision, IHS is entitled to summary judgment because the funding provisions of the ISDA are not self-executing but require annual funding agreements to identify the programs, services, functions, and activities to be performed or administered, the funds to be provided, the general budget category assigned, the time and method of payment, and any other provisions to which the parties agree. Appellant agrees that how the Board rules depends upon interpretation of the relevant provisions in Appellant's AFA's for FY's 1996 and 1997, and IHS's policies ISDM 92-2 and IHS Circular 96-04.

At the time Seldovia's FY 1996 AFA was entered into, IHS was in the process of revising ISDM 92-2, so the AFA provided as follows:

> *The parties have not agreed on the amounts to be paid or the method and process for calculation and payment of contract support costs under the AFA.* The IHS has proposed a new policy, which will be the successor to ISDM 92-2. This proposal is currently being circulated for tribal comment. It is anticipated that a new policy

> will be adopted by the IHS Director on or before October 1, 1995. *It is the position of the IHS* that any payment of or calculation of contract support costs shall be made in accordance with the new IHS policy referred to herein, except that if such a new policy is not in effect by October 1, 1995, contract support negotiations shall be based on ISDM 92-2 (emphasis added).

IHS's Circular 96-04, the successor policy to ISDM 92-2, was not issued until April 1, 1996. Thus, the Government asserts that Appellant's FY 1996 AFA was governed by ISDM 92-2, and that the amount of CSC paid for that year was in accordance with this policy. According to IHS, the only question before the Board is whether IHS met its obligations under ISDM 92-2, which it argues it did.

Seldovia requested an amendment to its 1996 AFA on January 24, 1996, approximately four months into the term of the FY 1996 AFA, because it had negotiated a new indirect cost rate with HHS's Office of Cost Allocation. IHS applied the new cost rate in determining the CSC payments the Tribe was entitled to but allegedly could not pay the entire amount because of its shortfall in appropriations. Although the Tribe subsequently sought the full amount to which it was otherwise entitled, IHS maintains that Seldovia was bound by the funding scheme it had agreed to in its AFA, which limited total CSC payments to the amounts recommended by the Appropriations Committee despite an increase in the total ISDA appropriation. But Appellant cites *MAPCO Alaska Petroleum. Inc., v. United States*, 27 Fed. Cl. 405 (1992), for the proposition that the Government cannot contractually force the Tribe to accept less than full CSC's when the Tribe is entitled to full CSC's by law. It also asserts that the Government cannot lawfully benefit from a contract provision contrary to law, citing *Beta Systems, Inc., v. United States*, 838 F.2d at 1185. We agree.

IHS also renews in this Appeal its argument that Sec. 314 in the Omnibus Consolidated and Emergency Supplemental Appropriations Act for FY 1999, Pub. L. 105-277, restated the Congress's intention that the obligation to fund contract support costs is limited to the amount specifically appropriated for that purpose each year. Sec. 314 states in part:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes.

By contrast, Appellant's position is that (1) IHS had a mandatory obligation to fully fund the Tribe's CSC requirement to the extent that funds were legally available, and (2) adequate funds were legally available in both FY 1996 and FY 1997 to fully fund the Tribe's CSC requirement. Appellant also disputes IHS' contention that it was bound by the wording of its AFA to accept a lesser amount, noting that the 1996 AFA specifically stated that Seldovia would receive CSC payments "as defined in section 106(a)(2) and (3)" of the Act (i.e., 25 U.S.C. sec. 450j-l(a)(2) and (3). According to Appellant:

> This mandatory contract language obligated the IHS to pay the Tribe's contract support requirement to the extent that funds were available in FY 1996 and FY 1997. Since more than adequate funds were available in those years, the contract and statute required the IHS to pay 100 percent of the Tribe's contract support requirement. Because the IHS failed to do so, it breached its

> contract with the Tribe and the Tribe is entitled to a judgment for damages.

The Board is unable to conclude that the Tribe ever agreed in the FY 1996 AFA that the policies set forth in ISDM 92-2 were controlling. If anything, the relevant language indicates a lack of agreement by the parties as to the amounts to be funded and the method of funding.

As for Sec. 314, Appellant contends that IHS' position that it "extinguishes" the Tribe's claims for more contract support costs must mean that the Tribe previously had a valid claim. It further argues that giving Sec. 314 retroactive effect would be inconsistent with the plain language of that provision and in clear violation of the three-part test for retroactivity enunciated in *Madrid v. Gomez*, 150 F. 3d 1030 (9th Cir. 1998), citing *Landgraph v. USI Film Products*, 511 U.S. 244 (1994). The tests are (1) whether Congress has expressly prescribed the statute's proper reach: a statute can operate retroactively only with a clear statement to that effect; (2) whether the statute is retroactive under the ordinary rules of statutory construction, including its legislative history; but (3) if neither of the previous steps sheds light on the scope of the statute, then the court must apply the judicial default rule that statutes are not to be applied so as to create a "retroactive effect."

Appellant asserts that the terms of Sec. 314 are on their face prospective ("are the total amounts available" and "may use"). It cites the language of *Landgraph* that: "The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." 511 U.S. 244 at 271. The *Landgraph* court adds a footnote as follows:

> While the great majority of our decisions relying upon the antiretroactivity presumption have involved interven-

ing statute burdening private parties, we have applied the presumption in cases involving new monetary obligetions that fell only on the government [*Ibid.*, case citations omitted].

However, we need not discuss the effect of Sec. 314 at greater length because the Board's position on that issue has already been made clear in *Cherokee* and been affirmed by the Federal Circuit in *Thompson*. Briefly, as Appellant urges, we did not find it contains the necessary requisites for retroactive application. Thus, Section 314 does not preclude summary judgment for Appellant.

Decision

Having thoroughly reviewed the parties' voluminous submissions in this matter, we find that this Appeal has no significant differences from *Cherokee*, and that the precedent in *Thompson* is controlling.

Accordingly, we grant Appellant's Motion for Summary Judgment and hold that, in the circumstances of this case, (1) the Tribe's mandatory and agreed-upon contract support costs should have been fully funded out of IHS's more than adequate lump-sum appropriations for the years in question, rather than being limited to amounts informally recommended by the Appropriations Committee; (2) IHS had an obligation to reprogram funds, if necessary, to fulfill that statutory obligation; and (3) Seldovia is entitled to an additional $252,878 in CSC to cover IHS's underpayment in FY's 1996 and 1997, together with interest calculated in accordance with the Contract Disputes Act. The Government's motions are hereby denied.

/s/ Bernard V. Parrette
BERNARD V. PARRETTE
Administrative Judge

I concur:

/s/ Candida S. Steel
CANDIDA S. STEEL
Chief Admionistrative Judge

APPENDIX B

INTERIOR BOARD OF CONTRACT APPEALS

SELDOVIA VILLAGE TRIBE	)	
	)	
Appellant	)	IBCA Nos. 3782-97, 3862-97
	)	
v.	)	APPELLEE'S SUPPLEMENTAL
	)	BRIEF IN SUPPORT OF
INDIAN HEALTH SERVICE	)	SUMMARY JUDGMENT
	)	
Appellee	)	

INTRODUCTION

This brief is submitted in response to the Board's Order of August 5, 2003. In submitting this brief, the Indian Health Service (IHS) will not reargue the legal issues addressed in the Federal Circuit's decision in *Thompson v. Cherokee Nation of Oklahoma,* 334 F. 3d 1075 (Fed. Cir. July 3, 2003). Nor are we conceding that the Federal Circuit's decision in *Cherokee* is correct. The Government has filed a petition for rehearing and rehearing en bane in *Cherokee* and we are not abandoning nor conceding legal arguments made in this case that would be affected by that decision. Rather, the purpose of this brief is to show that even if we accept the Federal Circuit's decision in *Cherokee,* Seldovia expressly agreed in its annual funding agreements (AFAs) to accept contract support cost (CSC) funding in accordance with how the IHS allocated funds for that purpose under its policies. Seldovia is bound by its agreement to accept CSC funding based upon IHS' policies governing the method and process for calculation and payment of CSC. The IHS performed its obligations under under [sic] the AFAs and its CSC policies and thus, even if we accept the *Cherokee* decision, the IHS is entitled to summary judgment in this case.

STATEMENT OF THE CASE

How the Board rules in this case depends upon interpretation of the relevant provisions in Seldovia's AFAs for FY 1996 and FY 1997 and IHS policies ISDM 92-2 and IHS Circular 96-04. The funding provisions of the ISDA are not self-executing. ISDA Section 450*l* establishes a model contract within the statute. That model contract requires that the parties enter into annual funding agreements identifying the programs, services, functions and activities to be performed or administered, the funds to be provided, the general budget category assigned, the time and method of payment, and any other provisions to which the parties agree. Section 450*l*(f)(2).

The FY 1996 Annual Funding Agreement (AFA) between the IHS and Seldovia was signed on June 27, 1995, approximately three months prior to the beginning of FY 1996. Section 3(A) of that AFA under the heading "Tribal Programs and Budget" sets forth the bargain between the parties as follows:

> The Seldovia Village Tribe agrees to administer the delivery of certain IHS services within the Seldovia Village Withdrawal Area and to provide and be responsible for the heath programs, activities, functions, and services identified below in accordance with the Compact and this Agreement, utilizing the resources transferred under this Agreement.

Emphasis added.[1] In other words, Seldovia agreed to carry out the programs with the funds to be transferred under the AFA.

[1] This identical language is in section 3(A) of the FY 1997 FA signed on May 22,1996 approximately four months prior to the beginning of FY 1997.

The AFA for FY 1996 indicates that, at the time of signing, the parties had not agreed whether to use the existing circular for calculation and payment of CSC or to use a methodology from a circular under development. The AFA provides as follows:

> The parties have not agreed on the amounts to be paid or the method and process for calculation and payment of contract support costs under the AFA. The IHS has proposed a new policy, which will be the successor to ISDM 92-2. This proposal is currently being circulated for tribal comment. It is anticipated that a new policy will be adopted by the IHS Director on or before October 1, 1995. It is the position of the IHS that any payment of or calculation of contract support costs shall be made in accordance with the new IHS policy referred to herein, except that if such a new policy is not in effect by October 1, 1995, contract support cost negotiations shall be based on ISDM 92-2.

Section 4(B) at page 6.[2] The date October 1, 1995 was the beginning of fiscal year 1996 and also the start date of the FY 1996 AFA.

The IHS issued IHS Circular 96-04, the successor policy to ISDM 92-2, effective April 1, 1996. Because the successor policy was issued after October 1, 1995, there is no dispute between the parties that the method and process for calculation and payment of CSC under the AFA would be governed by ISDM 92-2. Seldovia acknowledges this in its

[2] Section 4(B) of the AFA also dealt with CSC on Seldovia's tribal shares of contractible IHS Headquarters and Area "administrative functions . . . that support the delivery of services to Indians." ISDA section 450f(a)(1). CSC on tribal shares (considered a new and expanded program activity) should not be confused with CSC for ongoing contracts at issue here. In fact, Seldovia and the IHS entered into a separate settlement agreement for payment of CSC on tribal shares effective May 22, 1996. Thus, CSC on tribal shares is not at issue in this case.

claim letter to the IHS Director, Michael Trujillo, dated January 9, 1997. (Attached as Exhibit A). The letter states in pertinent part on page 2:

> Section 4(B) of the FY 1996 AFA provides for the payment of contract support funds for mdirect costs under section 106(a)(2) of the Act and Indian Self-Determination Memorandum No. 92.2 (the AFA provides that ISDA No. 92-2 shall apply if no revision of this memorandum [sic] in effect by October 1, 1995, which was the case). The amount above [the claim for $126,439] was determined based on the policies laid down in ISDM 92-2.

Thus, the parties agreed in Seldovia's FY 1996 AFA that IHS policy ISDM 92-2 would govern the method and process for calculation and payment of CSC for that fiscal year. The only question before the Board is whether the IHS met its obligations under ISDM 92-2 regarding the new indirect cost rate Seldovia received in the middle of the AFA term..

Seldovia requested an amendment to its 1996 AFA on January 24, 1996 (approximately four months into the term of the FY 1996 AFA) indicating that Seldovia had negotiated a new indirect cost rate of 47.3% with the DHHS Office of Cost Allocation. ISDM 92-2 states in Section 6 under the heading "ONGOING CONTRACTS:"

> The amount of indirect contract support funds representing the previous years's base will be distributed to Areas "recurring" to fund each Area's indirect cost need. Each contractor's need for indirect contract support shall be determined by calculating changes, if any, in indirect cost rates, bases, and pools. If funds available in the Area's indirect cost base are not adequate to meet total requirements, then the amount available shall be distributed according to each contractor's proportion of total need. These funds will be awarded to the contractor

as non-recurring funds. (See 4.A(3) for treatment of direct contract support costs).

Each year, Areas are required to report additional needs for indirect contract support funds beyond the amount provided in their previous year's recurring base, or any surplus of funds provided in their recurring base based on current year needs.

Seldovia's understanding of IHS' obligations under ISDM 92-2 is stated in Seldovia's claim letter as follows:

> At the time IHS received our amendment to adopt the indirect cost rate, its obligation, as stated in ISDM 92-2 was: "If funds available in the Area's indirect cost base are not adequate to meet total requirements, then the amount available shall be distributed in accordance with each contractor's proportion of total need." IHS' own procedure provided that it would include Seldovia's need which had been demonstrated to it by documentation when it calculated the amounts of contract support funds distributed to all contractors and compact co-signers in Alaska for FY 1996. By its own admission IHS did not do this

The IHS Area Office applied the new indirect cost rate to determine Seldovia's CSC "need" for the next fiscal year (1997). Moreover, Seldovia's FY 1997 AFA contains the agreement of the parties concerning how this increased CSC need due to the new indirect cost rate should be handled. The parties agreed that any non-recurring amount due to the increased indirect cost rate was "to be determined," with the following footnote explaining what this meant:

> This amount represents non-recurring contract support funds based on Seldovia's increase in indirect rate in FY 96 and should approximately be $126,291. Concerning these funds, IHS has agreed that they will come from [sic] either "Pool Number 2 Prior Year CSC Base" or

> "Pool Number 3 Mandatory increases/Shortfall Costs" as defined in ISDM 92-2. Other non-recurring funds will not be specifically identified in this Agreement but will be provided to the Seldovia Village Tribe in the future to the same extent as they have historically been provided.

This language contains an internal contradiction because "Pool Number 2 Prior Year CSC Base (Ongoing Awards)" and "Pool Number 3 Mandatory Increases/Shortfall Funds" are contained in IHS Circular 96-04 at page 13. There are no such references in ISDM 92-2. The only reasonable inference is that the words are intended to refer to Pools No. 2 & *3*, which are described in IHS Circular 96-04 as follows:

> Pool No. 2 Prior Year CSC Base (Ongoing Awards). The amount of indirect contract support funds representing the previous year's base will be distributed to Areas as "recurring" to fund each Area's indirect cost need. Each awardee's need for indirect CSC shall be determined by calculating changes, if any, in indirect cost rates, bases, and pools. If the funds available in the Areas's indirect cost base are not adequate to meet all awardee's requirements, then the amount available shall be distributed according to each awardee's proportion of total need, except that prior year funds should not be reduced if justified as described below. These funds will be awarded to the contractor as non-recurring funds.
>
> Pool No. 3 Mandatory Increases/Shortfall Funds. Mandatory increases that represent a percentage of the Area's prior year recurring indirect cost base are distributed annually as available. Additional shortfall funds may also be made available to the IHS and allocated to Area offices for this purpose. Since awardees are required to rejustify their needs for indirect CSC each year, amounts required for indirect CSC may exceed the amount of available for this purpose. Mandatories should be allocated in such a manner as to provide increases to awards

based on each awardee's proportion of total additional need. If additional need is proportionately greater for some awardees, they will receive a greater percentage of CSC mandatories and shortfall funds.

Prior year funds provided for indirect CSC to each awardee, if justified in subsequent years, shall not be reduced by the IHS, except as authorized in section 106(b) of the ISDA. Awardees should expect to receive these funds continuously, only if they continue to be justified for at least the same amount or greater annual need. They are awarded as non-recurring funds to enable the Area to adjust amounts previously awarded if the amount of costs allocated to the IHS for reimbursement should decrease. If amounts previously awarded for indirect CSC are not justified by an awardee in the subsequent year, they will be made available for distribution to other awardees in the Area with unfunded CSC needs for this purpose.

The Area Office did not conduct a proportionate distribution of its indirect cost base for either FY 1996 or FY 1997 because there were no new funds allocated to that base that could be used for a proportionate distribution without decreasing existing contracts for other tribes.

The record in this case contains a budget table submitted in response to Seldovia's interrogatory 4 showing the distribution to the IHS Areas of the CSC funds earmarked in the appropriation committee reports for fiscal years 1996 and 1997. (Attached as Exhibit B). The Alaska Area base for FY 1995 (first column) was $38,968,700. The Alaska Area base for FY 1996 (4th column) was $40,239,500. The increase is due to certain Alaska tribes receiving a total of $1,190,000 from the ISD Fund of $7,500,000 for that year for new and expanded contracts, and an annualized amount for the new Kotzebue facility of $80,000. The Alaska Area base for FY 1997 (8th column) was $40,644,500, again the small increase

due to distributions from the ISD Fund for that year and an annualized allocation of $120,000 for the new Kotzebue facility. The Alaska Area received no new CSC funds for proportionate distribution to ongoing contracts during FY 1996 or FY 1997. (Response to Appellant's Request for Admissions No. 8).

ARGUMENT

Seldovia claims, despite its agreement that any additional indirect costs would be determined by IHS' policies, that when it received its new indirect cost rate, it was entitled by statute to additional CSC funding based on applying the new rate to its program base for FY 1996 and FY 1997. But this is not the funding scheme that Seldovia agreed to.

Instead, Seldovia agreed in its FY 1996 AFA that ISDM 92-2 would govern the method and process for calculation and payment of CSC. ISDM 92-2 does not require immediate payment of CSC based on a new indirect cost rate. Rather, under ISDM 92-2, a change in the indirect cost rate mid-term in the AFA affects the calculation of the contractor's CSC "need" for the next year. Furthermore, ISDM 92-2 provides that the source of funding for indirect costs is the amount allocated to the Alaska Area for its indirect cost base. ISDM 92-2 in Section 6 (see page 4 above) provides that if funds are not available in the Area's indirect cost base to meet the total indirect cost "need" of all contractors, the amount available in the Area's indirect cost base for all Area contractors will be distributed according to each contractor's proportion of total need. The were no new funds allocated to the Area's indirect cost base for proportionate distribution, and the IHS did not reduce indirect cost funding for any contractor to make funds available for proportionate distribution. That would violate ISDA section 450j-l(b). As no new funds were available in the Alaska Area's indirect cost base for fiscal years 1996 and 1997, then, according to ISDM 92-2, Seldovia's new indirect cost rate increased Seldovia's "need" for CSC, but no

additional funding was required. Instead, ISDM 92-2 provided that "[d]eficiencies for existing contracts will be reported in the annual report to Congress required by Section 106(c).[3]

It is clear from the text of ISDM 92-2 (see Section 6 quoted above) that the funds available for proportionate distribution that Seldovia seeks are limited to the Alaska Area's indirect cost base. Beyond those funds, ISDM 92-2 provides for making changes to a tribal contractor's "need" for CSC for ongoing contracts due to, among other things, a change in the contractor's indirect cost rate. In this case, IHS was notified of the change in Seldovia's indirect cost rate four months into the annual term of the AFAs in Alaska, too late to change retroactively the distribution of indirect cost funds to Alaska contractors. Thus, even if the Alaska Area had retroactively changed Seldovia's need calculation, that change would not have resulted in any increased funding under ISDM 92-2.

The same is true for FY 1997. Seldovia specifically agreed that any funds to pay its increased indirect cost need of $126,291 as a result of its new indirect cost rate will come from either Pool 2 or Pool 3 described in IHS Circular 96-04. In its claim letter Seldovia asserts:

> Our legal counsel advises us that IHS' total disregard of its own policies and of Seldovia's rights thereunder, at least to a pro rata share of the contract support funds available to the Alaska Area Office in FY 1996 was arbitrary and capricious and that the government is liable to us for the loss occasioned by its failure to process our amendment . . . notwithstanding the reference to "Pool No. 2 Prior Year CSC Base" and specific reference to

[3] ISDA, 25 U.S.C. 450j-l(c) required the Secretary to provide a report to Congress each year that would include "an accounting of any deficiency of funds needed to provide required indirect costs to all contractors for the current fiscal year."

> the increase in Seldovia Village Tribe's indirect cost rate and to the specific amount of $126,291, all in footnote 1, page 5. of the FY 1997 AFA.

Emphasis added. The underscored language is clear that Seldovia asserts its claim despite what it agreed to in its AFAs. We submit that Seldovia must be held to its contracts. Seldovia has not disputed that there were no new funds in the Alaska Area's indirect cost base in either FY 1996 or FY 1997 for proportionate distribution and IHS could not reduce other tribe's contracts to make funds available for a proportionate distribution. ISDA, 25 U.S.C. 450j-l(b). Thus, the IHS met its obligations to Seldovia under its policies as incorporated by Seldovia in its AFAs. The IHS is entitled to summary judgment in this case.

CONCLUSION

For the aforementioned reasons, the Board should grant Appellee's motion for summary judgment in this case.

Respectfully submitted:

/s/ Duke McCloud
DUKE MCCLOUD
Chief, IHS Branch
Office of the General Counsel
Room 4A-53, Parklawn Building
5600 Fishers Lane
Rockville, Maryland
301-443-8220

(8) (6)

Nos. 02-1472 & 03-853

Supreme Court, U.S.
FILED
JUN 17 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHEROKEE NATION OF OKLAHOMA and
SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,

Petitioners,

v.

TOMMY G. THOMPSON,
Secretary of Health and Human Services, *et al.*,

Respondents.

TOMMY G. THOMPSON,
Secretary of Health and Human Services,

Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND FEDERAL CIRCUIT

BRIEF OF THE TUNICA-BILOXI TRIBE OF LOUISIANA, THE RAMAH NAVAJO SCHOOL BOARD, INC., THE RAMAH NAVAJO CHAPTER, AND THE OGLALA SIOUX TRIBE AS *AMICI CURIAE* IN SUPPORT OF THE CHEROKEE NATION AND THE SHOSHONE-PAIUTE TRIBES

C. BRYANT ROGERS
ROTH, VANAMBERG, ROGERS,
ORTIZ & YEPA, LLP
P.O. Box 1447
Santa Fe, NM 87504
(505) 988-8979

MICHAEL P. GROSS
Counsel of Record
DANIEL H. MACMEEKIN
ERIC TREISMAN
M.P. GROSS & ASSOCIATES, P.C.
460 St. Michael's Drive, Suite 401
Santa Fe, NM 87505
(505) 995-8066

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of Amici Curiae	1
Summary of Argument	2
Argument	5
I. Self-Determination Contracts Are No Less Enforceable Than Other Federal Contracts.	5
II. Contract Authority is Distinct from Expenditure Authority.	8
III. A Funds Available Clause Is Strictly Construed Against the Government.	13
Conclusion	20
Appendix — Letter From John R. Bolton To Daniel K. Inouye Dated March 11, 1988	1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Army Corp of Engineers' Continuing Contracts, Matter of
56 Comp. Gen. 437, 1977 WL 10467 13

AT&T v. Central Office Telephone, Inc.,
524 U.S. 214 (1998) 17

Babbitt v. Oglala Sioux Tribal Safety Department,
194 F.3d 1374 (Fed. Cir. 1999),
cert. denied, 530 U.S. 1203 (2000) 4, 5

Bath Iron Works v. United States,
20 F.3d 1567 (Fed. Cir. 1994) 9

Busby School of the Northern Cheyenne Tribe v. United States,
8 Cl. Ct. 596 (1985) 21

Cherokee Nation v. Thompson,
311 F.3d 1054 (10th Cir. 2002) 5, 21

C. H. Leavell v. United States,
530 F.2d 878 (Ct. Cl. 1976) 14

County of Oneida v. Oneida Indian Nation,
470 U.S. 226 (1985) 17

Dougherty's Case,
18 Ct. Cl. 496 (1883) 10

Cited Authorities

Page

Gibney v. United States,
114 Ct. Cl. 38 (1949) 9

Major Collins' Case,
15 Ct. Cl. 22 (1879) 8

Murray v. Charleston,
96 U.S. 432 (1878) 20

New Valley Corp. v. United States,
119 F.3d 1576 (Fed. Cir. 1997) 16, 17

New York Airways v. United States,
369 F.2d 743 (Ct. Cl. 1966) 9

Pueblo of Zuni v. United States,
No. CIV 01-1046 LH/LEG
(D.N.M., filed Sept. 10, 2001) 4

Ramah Navajo Chapter v. Norton,
No. CIV 90-0957 (D.N.M.), *on remand from*
Ramah Navajo Chapter v. Lujan,
112 F.3d 1455 (10th Cir. 1997) ..... *passim*

Ramah Navajo School Board, Inc. v. Babbitt,
87 F.3d 1338 (D.C. Cir. 1996) 2, 12, 13

Republic Airlines, Inc. v. U.S. Department of Transportation,
849 F.2d 1315 (10th Cir. 1988) 17

Page

Russello v. United States,
464 U.S. 16 (1983) 15

S.A. Healy Co. v. United States,
576 F.2d 299 (1978) 4, 18, 19

San Carlos Irrigation & Drainage District v. United States,
23 Cl. Ct. 276 (1991) 19, 20

St. Regis Mohawk Tribe, Matter of Departmental Appeals Board, No. 1808
(App. Div., Jan. 17, 2002) 13

Shoshone-Bannock Tribe v. Thompson,
279 F.3d 660 (9th Cir. 2002) 5

Tunica-Biloxi Tribe of Louisiana v. United States,
1:02CV02413 RBW
(D.D.C., filed Dec. 9, 2002) 1, 4

United States v. Langston,
118 U.S. 389 (1896) 9

United States v. Vulte,
233 U.S. 509 (1914) 10

United States v. Winstar,
518 U.S. 839 (1996) 20

Wetsel-Oviatt Lumber Co. v. United States,
38 Fed. Cl. 563 (1997) 9

Page

Statutes:

The Budget Act,
2 U.S.C. § 622 (2)(A) 8

The Administrative Procedure Act,
5 U.S.C. §§ 553, *et seq.* 12

The Indian Self-Determination and Education Assistance Act,

25 U.S.C. §§ 450, *et seq.* ..... *passim*

25 U.S.C. § 450j(c)(1) 10, 15

25 U.S.C. § 450j-1(a) 10

25 U.S.C. § 450j-1(a)(1) 10

25 U.S.C. § 450j-1(a)(2) ..... *passim*

25 U.S.C. § 450j-1(a)(3) 10

25 U.S.C. § 450j-1(a)(5) 10

25 U.S.C. § 450j-1(b) ..... *passim*

25 U.S.C. § 450j-1(b)(3) 12

25 U.S.C. § 450j-1(g) 2, 10, 12

25 U.S.C. § 450*l*(c)1(a)(2) 16, 17

25 U.S.C. § 450*l*(c)1(b)(4) 16

25 U.S.C. § 450*l*(c)1(d)(1) 18

25 U.S.C. § 450*l*(c)1(d)(2) 18

25 U.S.C. § 450m-1(a)(d) 7

25 U.S.C. § 450m-1(d) 5

Page

25 U.S.C. § 1658 16

25 U.S.C. § 2008(g)(2) 15, 16

The Judgment Fund,
31 U.S.C. § 1304 9

The Contracts Dispute Act,

41 U.S.C. §§ 601, *et seq.* 3, 5

41 U.S.C. § 612(a) 4, 9

Public Law 100-472, 102 Stat. 2285 (1988) 6, 7, 21

Public Law 100-713, 102 Stat. 4824 (1988) 14

Public Law 103-413, 108 Stat. 4250 (1994) 21

Public Law 105-277, 112 Stat. 2681 (1998) 17

Page

Other Authorities:

Office of Management and Budget, BUDGET OF THE U.S. GOVERNMENT, FY 2005: THE BUDGET SYSTEM AND CONCEPTS 383 (2004) 8

1 General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-4 8

General Accounting Office, INDIAN SELF-DETERMINATION ACT: SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED (No. GAO/RCED-99-150, June 1999) 3, 18

House Report No. 93-1600 15

Senate Report No. 100-274 ..... 6, 11, 21

Senate Report No. 103-374 11

INTEREST OF *AMICI CURIAE*

Pursuant to United States Supreme Court Rule 37.3, the Tunica-Biloxi Tribe of Louisiana, the Ramah Navajo School Board, Inc., the Ramah Navajo Chapter, and the Oglala Sioux Tribe, with the written consent of all parties, submit this *amici curiae* brief supporting the Cherokee Nation and the Shoshone-Paiute Tribes.[1] The written consents are on file with the Clerk of the Court.

Amici are federally-recognized Indian tribes and tribal organizations owed contract support costs. The Tunica-Biloxi Tribe of Louisiana and the Ramah Navajo School Board, Inc., are named plaintiffs in a putative class action in the District Court for the District of Columbia, *Tunica-Biloxi Tribe of Louisiana v. United States*, No. 1:02CV02413 RBW (filed Dec. 9, 2002). That case presents contract support claims for Fiscal Years 1995, 1996, and 1997, years involving lump sum appropriations (lump sum years) identical to those presented here, and claims for underpayment of contract support costs in the later years in which the annual appropriations acts limited how much of those appropriations could be used by the Secretary to pay the government's contract support costs obligations (cap years).

The Ramah Navajo Chapter and the Oglala Sioux Tribe are named plaintiffs in a certified class action seeking contract support on self-determination contracts awarded by the Bureau of Indian Affairs, an agency of the Department of the Interior, in *Ramah Navajo Chapter v. Norton*, D.N.M.

1. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief, in whole or in part; and that no person or entity, other than Amici and their counsel, contributed monetarily to the preparation and submission of this brief.

No. CIV 90-0957 LH, on remand from *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). The lump sum year claims in that case were settled. *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999), and *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002). Cap year claims in that case are pending.

SUMMARY OF ARGUMENT

A decision for the Cherokee Nation and the Shoshone-Paiute Tribes (collectively, "Cherokee") may rest solely upon the availability of funds. That is but the narrowest ground for a ruling in favor of Cherokee. This brief presents a different basis for that outcome.

In 1988, Congress amended the Indian Self-Determination Act, 25 U.S.C. §§ 450, *et seq.*, to create an enforceable federal contractual obligation to pay contract support in the amount necessary to operate the contracted program. 25 U.S.C. § 450j-1(g). That provision in combination with section 450j-1(a)(2) directs the Secretary of Health and Human Services ("the Secretary"), without regard to availability of appropriations, to add the full requisite amount of contract support to each Indian Self-Determination Act contract on an annual basis. This directive confers contract authority upon the Secretary, the power delegated by Congress to an agency to bind the United States to an obligation even in the absence of an appropriation to liquidate it. Cherokee should therefore prevail on its contract claim against the United States regardless whether sufficient funds were available from appropriations to permit the Secretary to discharge the United States' contractual obligations.

Only when Congress funds a program does the contract support add-on obligation arise. Since contract support rises and falls in proportion to the level of the program appropriated by Congress, Congress retains the power of the purse by controlling program levels. 25 U.S.C. § 450j-1(a)(2).[2] If Congress chooses not to fund Indian health programs, no claim for contract support arises. But once Congress enacts an appropriation for health programs, contract support necessary to operate the contracted program at the Secretarial level is a mandatory component of the contract price. Contract authority as to contract support costs is the means employed by Congress to ensure adequate and stable funding to carry out self-determination contracts at the Secretarial level.

By making self-determination contracts enforceable under the Contract Disputes Act, 41 U.S.C. §§ 601, *et seq.*, Congress has made clear that they are no less enforceable than other federal contracts. Case law on the enforcement of federal contracts recognizes that Congress may authorize contractual obligations in advance of appropriations. In some other statutes and contracts, Congress forbids creation of enforceable contract obligations beyond appropriations sufficient to liquidate the obligation. But the exculpatory clauses applicable to self-determination contracts differ radically in wording from those in such statutes and contracts. The clauses here restrict only expenditure authority, the

---

2. Most contract support costs are indirect costs set by rates negotiated with the cognizant agency, usually the Interior Department. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1457 (10th Cir. 1997). Nationwide, rates have remained uniform at approximately 25%. U.S. General Accounting Office, INDIAN SELF-DETERMINATION ACT: SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED 30 (No. GAO/RCED-99-150, June 1999).

authority of the Secretary to liquidate an obligation. They do not limit the Secretary's contract authority, the authority to create the federal contract obligation in the first instance. Moreover, government-drafted exculpatory clauses are subject to especially close scrutiny when the Executive Branch has created or contributed to an insufficiency of funds by failing to ask Congress for adequate appropriations. *S.A. Healy Co. v. United States*, 576 F.2d 299 (1978); *San Carlos Irrigation & Drainage District v. United States*, 23 Cl. Ct. 276 (1991).

Contrary to the suggestion on page 27 of the Government's Petition for Certiorari in No. 03-853, liability in cap years remains at issue in three pending cases: *Ramah Navajo Chapter v. Norton*, No. CIV 90-0957 LH (D.N.M.), on remand from *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997); *Tunica-Biloxi Tribe of Louisiana v. United States*, No. 1:02CV02413 RBW (D.D.C., filed Dec. 9, 2002); and *Pueblo of Zuni v. United States*, No. CIV 01-1046 LH/LEG (D.N.M., filed Sept. 10, 2001.)[3] The instant

3. The issue of cap year liability was decided in the Government's favor in *Babbitt v. Oglala Sioux Tribal Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000). That case held that the proviso at 25 U.S.C. § 450j-1(b) prevents recovery for a cap year shortfall. However, the *Oglala* analysis did not consider the contract authority argument and did not take into account the Contract Disputes Act provision, 41 U.S.C. § 612(a), for payment of contract judgments against the United States from the Permanent and Indefinite Judgment Fund. It also failed to distinguish the "provision of funds" formulation in section 450j-1(b) from the standard formulation used when Congress intends to restrict contract authority as opposed to expenditure authority. *See* No. 02-1472, Petition for Certiorari 78a. The court thus did not apply ordinary contract law principles.

(Cont'd)

appeals concern lump sum years in which no appropriation act restrictions were imposed on the Secretary's use of appropriations for payment of contract support. If the Court rules that funds sufficient to pay the contract support amounts here sought by the tribes were available, the additional argument presented here need not be addressed.

ARGUMENT

I. *Self-Determination Contracts Are No Less Enforceable Than Other Federal Contracts.*

By incorporating the Contract Disputes Act, 41 U.S.C. §§ 601, *et seq.*, into the Indian Self-Determination Act, 25 U.S.C. § 450m-1(d), Congress provided that self-determination contracts would be no less enforceable than other federal contracts:

> . . . . [T]he Committee determined that the use of the term "contract" is important to convey the sense of a legally binding instrument that cannot be terminated by administrative action without the

(Cont'd)

Neither did the Tenth and Ninth Circuit panels that followed *Babbitt* apply ordinary principles of federal contract law in their analysis of the Indian Self-Determination Act. *Cherokee Nation v. Thompson*, 311 F.3d 1054 (10th Cir. 2002), now before this Court in No. 02-1472, clashes with the Tenth Circuit's prior ruling in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1463 (1997), *discussed infra*, at 7-8. Both *Cherokee* and *Shoshone-Bannock Tribes v. Thompson*, 279 F.3d 660 (9th Cir. 2002), misconstrued a "shall remain available" appropriation clause for new and expanded contracts as a cap on existing contracts and applied the flawed reasoning of *Oglala* to the newly found cap.

> legal consequences that would be associated with the termination of contractual obligations by either party. Furthermore, the Committee believes that the retention of the term "contract" is consistent with the provision which authorizes the application of the Contract Disputes Act to self-determination contracts.

Sen. Rep. No. 100-274, at 19 (1987).

This consequence of Public Law 100-472 was known well before passage. On March 11, 1988, the Department of Justice commented on S. 1703:

> . . . To the extent there is a recognizable body of public contract law, it largely has evolved as the courts or agency boards of contract appeals have interpreted and applied federal procurement law and the federal acquisition regulations. [fn 12] Regardless that self-determination contracts may not otherwise be considered "procurement contracts," unless this body of existing law can be looked to for guidance, the courts and boards will have no foundation upon which to resolve disputes.
>
> [fn 12] The Contract Disputes Act, by its terms and from the legislative history, was carefully crafted to apply principally to "procurement contracts." *See* 41 U.S.C. 602(a) (1982). . . . As a result, the substantive law involving the Contract Disputes Act essentially is procurement contract law.

Letter from John R. Bolton to Daniel K. Inouye 7-8 (March 11, 1988) (reproduced in Appendix to this Brief at 12a).

The Department of Justice foresaw that the Contract Disputes Act would bring contract authority to bear:

> Applying the Contract Disputes Act to self-determination contracts raises many serious concerns [fn 13]. . . .
>
> [fn 13] For example, because funding for self-determination contracts is appropriated and managed in markedly different fashion from other agency appropriations, with the agency having much less flexibility to shift self-determination funds, applying the Contract Disputes Act – and its provisions concerning access to and reimbursement of the Judgment Fund for successful claims – to self-determination contracts may well lead to a significant loss of agency and Congressional control over appropriations for the self-determination program.

Id. at 13a.

Mindful of the Assistant Attorney General's analysis, Congress nonetheless proceeded to incorporate the Contract Disputes Act into the Indian Self-Determination Act. Pub. L. 100-472, § 206(a) (d), 102 Stat. 2285, 2294-95 (1988), codified as amended, 25 U.S.C. § 450m-1(a), (d).

The Tenth Circuit concluded that "the 1988 amendments to the Act mandate that tribes entering self-determination contracts receive full funding for all reasonable contract support costs associated with self-determination contracts." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1463 (1997).

Although the decision does not deal with insufficiency of appropriations, its analysis supports the existence of authority in the Secretary to create binding federal obligations for payment of contract support costs to self-determination contractors even if the Secretary is ultimately not given sufficient appropriations to liquidate those obligations.

II. *Contract Authority is Distinct from Expenditure Authority.*

It is well settled through a long series of federal contract cases as well as in the Budget Act[4] that the United States may be liable upon an obligation regardless whether a liquidating appropriation is made. 1 General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-4 ("GAO Treatise"). *See also* Office of Management and Budget, BUDGET OF THE U.S. GOVERNMENT, FY 2005: THE BUDGET SYSTEM AND CONCEPTS 383 (2004).

Recognition of Congress' ability to authorize the creation of contract obligations even in the absence of appropriations to pay them goes back at least to *Major Collins' Case*, 15 Ct. Cl. 22, 35 (1879):

> This court, established for the sole purpose of investigating claims against the government, does not deal with questions of appropriations, but with the legal liabilities incurred by the United States. . . . That such liabilities may be created where there is no appropriation of money to meet them is recognized. . . .

4. "The term 'budget authority' means the authority provided by Federal law to incur financial obligations, as follows: . . . (iii) contract authority, which means the making of funds available for obligation, but not for expenditure. . . ." 2 U.S.C. § 622(2)(A).

> The officers of the Treasury have no authority to pay such compensation until appropriations therefor are made. . . . The liability, however, exists independently of the appropriation, and may be enforced by proceedings in this court.

To the same effect are *United States v. Langston*, 118 U.S. 389, 394 (1896) (simply because an appropriation is not sufficient to pay an obligation of the United States does not mean the obligation is abolished); *Bath Iron Works v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994) (judgments under the Contract Disputes Act are to be paid from the Judgment Fund, 31 U.S.C. § 1304, as directed by 41 U.S.C. § 612(a), regardless "whether adequate funds existed at the agency level to satisfy the judgment"); *New York Airways, Inc. v. United States*, 369 F.2d 743, 748-51 (Ct. Cl. 1966) (appropriation insufficiency does not bar recovery under an implied-in-fact contract authorized by law even where the statute contains a payment proviso tied to availability of appropriations); *Gibney v. United States*, 114 Ct. Cl. 38, 53 (1949) ("We know of no case in which any of the courts have held that a simple limitation on an appropriation bill of the use of the funds has been held to suspend a statutory obligation"); and *Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 571 (1997):

> Insufficient appropriations at the agency level "merely impose [ ] limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its sufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties." *Ferris [v. United States]*, 27 Ct. Cl. [542 (1892)], at 546; *see also New York*

> *Airways, Inc.*, 177 Ct. Cl. at 811, 369 F.2d 743 **("The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims").**

(Emphasis and brackets added). *See also United States v. Vulte*, 233 U.S. 509, 514-15 (1914); *Dougherty's Case*, 18 Ct. Cl. 496 (1883).

While the Secretary does not have contract authority to award Secretarial program monies until Congress appropriates, 25 U.S.C. § 450j(c)(1), the Secretary has contract authority to create enforceable federal contract obligations for the payment-of full contract support costs under the Indian Self-Determination Act whenever Congress does appropriate program monies because:

- the claims are made for years for which contractable program monies have been appropriated;

- the language of sections 450j-1(a)(2) to (5) and 450j-1(g) contains no condition that limits the peremptory command "shall add", by which the Secretary is authorized and directed to add to contracts executed under the statute the "full amount" of contract support costs required to administer those contracts;

- any other construction produces conflict among sections 450j-1(a), 450j-1(g), 450j(c)(1), and 450j-1(b); and

- section 450j-1(b)'s proviso is given its plain meaning, confining only the Secretary's expenditure authority.

Creating an entitlement to full contract support was the announced legislative purpose of the 1988 and 1994 amendments to the Indian Self-Determination Act.[5] Congress

---

5. The amendments made by section 110 are necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the Self-Determination Act. The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations.

Sen. Rep. No. 100-274, at 37 (1987).

> Throughout this section the Committee's objective has been to assure that there is no diminution in program level when programs, services, functions or activities are transferred to tribal operation. In the absence of section 106(a)(2), as amended [now 25 U.S.C. § 450j-1(a)(2)], a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid.

Sen. Rep. No. 103-374, at 9 (1994). *And see Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997): "Defendants' interpretation of the Act is unreasonable. Not only does its interpretation not benefit tribes that have chosen to enter into self-determination contracts, it harms them by depriving them of funds necessary to carry out those contracts."

has legislative discretion to budget any amount it wants for Indian health care. But under its amended Indian Self-Determination Act scheme, once an appropriation has been made for programs or functions covered by a contract, the contractor is "entitled" (25 U.S.C. § 450j-1(g)) to have added to its Indian Self-Determination Act contract the full amount of contract support needed to run the contracted program. Congress may provide for a "Cadillac" program or a "Yugo" program but the mandate of section 450j-1(g) is that it arrive with a full fuel tank.[6]

---

6. The relevant statutory provisions are:

> "There **shall be added** to the amount required by paragraph (1) contract support costs . . . to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 450j-1(a)(2) (emphasis added);
>
> "Upon the approval of a self-determination contract, the Secretary **shall add** to the contract **the full amount of funds to which the contractor is entitled under subsection (a)** of this section." *Id.* § 450j-1(g) (emphasis added).
>
> "The amount of funds required by subsection (a) of this section – **(1) shall not be reduced** to make funding available for [among other things] contract monitoring or administration by the Secretary . . . [or] (3) . . . to pay for Federal functions. . . ." *Id.* § 450j-1(b)(3) (emphasis added).

Ramah Navajo School Board, Inc. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996), is not to the contrary. That case, brought under the Administrative Procedure Act, 5 U.S.C. §§ 553, *et seq.*, determined that the Secretary of the Interior's decision to apply a severe funding sanction for failure by plaintiff-contractors to submit an indirect cost proposal by a certain date was reviewable. The dispute concerned only

(Cont'd)

The Department of Health and Human Services has already implicitly acknowledged the existence of contract authority for advance funding of Indian Self-Determination Act contracts. In a decision final for the agency, the Department's Appeals Board held that an Indian Self-Determination Act contractor must be paid at the outset of the contractor's fiscal year, even though funds for the last quarter of that year – which fell in the next federal fiscal year – had not yet been and might never be appropriated. *Matter of St. Regis Mohawk Tribe*, Departmental Appeals Board, No. 1808 (App. Div., Jan. 17, 2002), http://www.hhs.gov/dab/decissions/dab1808.html (as visited June 15, 2004).

III. *A Funds Available Clause Is Strictly Construed Against the Government.*

Government attorneys, to counter judicial rejection of their argument that an insufficient appropriation cancels a contract obligation, began inserting exculpatory "funds available" clauses into standard government contracts to shift the risk of insufficient appropriations to contractors. *See Matter of Army Corps of Engineers' Continuing Contracts*, 56 Comp. Gen. 437, 1977 WL 10467, containing a comprehensive history and discussion of funds available clauses; 2 GAO Treatise, at 6-51 (discussing *Army Corps*). The typical funds available clause runs paragraphs, even pages, using specific well-tested wording to provide variously that:

- the Government's *contract obligation* is contingent upon appropriations;

(Cont'd)

allocation of funds already under the Secretary's control. That strictly statutory action did not present any issue of *contract* interpretation. It did not seek a money judgment under the Contract Disputes Act; and it clearly distinguished the payment duties of the Secretary from the Government's contract obligation. 87 F.3d at 1344-45.

- the *contract is reduced* proportionate to any insufficiency of appropriations;

- the *contract amount* is reduced proportionate to any reduction in appropriation; and

- the *contractor assumes all risk* of loss if Congress fails to make a liquidating appropriation.

See, e.g., C.H. Leavell v. United States, 530 F.2d 878, 894-95 (Ct. Cl. 1976) (setting forth the standard "SP-19" funds available clause).

Congress has also imposed such limitations on the Government's liability in numerous statutes. A sample of over fifty such statutes is set forth in Cherokee's Petition for Certiorari, at 78a. Each employs precise language limiting the authority of an agency to bind the Government to a contract for more than the amount of appropriations available for the purpose. Of particular interest is section 1658 ("limitation on contract authority") of title 25, U.S.C., applicable to tribally controlled school grants added by Title V, § 501 of Pub. L. 100-713, 102 Stat. 4824:

> The authority of the Secretary to enter into contracts under this title [Title V, § 508 of Pub. L. 94-437] shall be to the extent, and in an amount, provided for in Appropriation Acts.

(Bracketed insert added).

That Act was passed by the same Congress and vetted by the same committees that reviewed and enacted the 1988 amendments including the proviso in Section 450j-1(b) to

the Indian Self-Determination Act, Public Law 100-472. *See also* 25 U.S.C. § 2008(g)(2), directing the Secretary to reduce school grants by the amount of any shortfall in appropriations. No comparable language appears in the Indian Self-Determination Act or in the Indian Self-Determination Act model agreement except as to the out-years of multi-year contracts. 25 U.S.C. § 450j(c)(1).[7]

The funds available clause in the model agreement does *not* make the United States' liability contingent on appropriations, does *not* state that a shortfall reduces the contract amount, and does *not* state the contractor assumes all risk of this shortfall. It says only:

> **Subject to the availability of appropriations, the Secretary shall make available** to the contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). . . .

7. The Government mistakenly construes 25 U.S.C. § 450j(c)(1) to apply to current year contracts. Section 450j(c)(1) addresses multi-year Indian Self-Determination Act contracts. It limits only the Secretary's authority to bind the Government to precise dollar amounts for a given year before appropriations for Indian Health Service programs have been made for that year. The force of section 450j(c)(1) is expended once such an appropriation is made. *See* H. Rep. No. 93-1600, at 22, 29 (1974) (statement by Commissioner of Indian Affairs on behalf of Secretary of the Interior): "This discretionary authority provides for contracts over a year in length but, as to years after the first year, the contract is more of a declaration of intent until sufficient appropriated funds have become available for the future years." The proviso in section 450j-1(b) would not be needed if section 450j(c)(1) already applied. That the two provisions are fundamentally different in text works against the Government's contention and supports the tribal reading of the law. *Russello v. United States*, 464 U.S. 16, 23 (1983) (use of different words in same statute bespeaks different meaning and intent).

25 U.S.C. § 450*l*(c), *Model Agreement*, sec. 1(b)(4) (emphasis added). Had Congress wanted to limit the obligation of the United States to pay full contract support, rather than just the liquidation of that obligation by the Secretary, it demonstrably knew how to do so. All it had to do was employ the language of sections 1658, or 2008(g)(2), or any of the other statutes cited in Cherokee's Petition for Certiorari, at 78a.

In *New Valley Corp. v. United States*, 119 F.3d 1576 (Fed. Cir. 1997), the Government, after canceling space shuttle launches following the Challenger disaster, invoked an exculpatory clause to absolve itself of liability for not launching a contractor's satellite. The Federal Circuit held that, although the Government's reading was linguistically plausible, that reading would undo the parties' purpose in entering the agreement, destroy its validity, and give one party unlimited power over the other:

> Construing Art. V to permit the government, at its whim, to walk away from the [agreement] with impunity would render this article meaningless. . . . A party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void.

Id. at 1584, quoting *Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756, 760 (1982) (citation, internal quotation marks, and parentheses omitted). The court held instead that the exculpatory clause must be construed "narrowly and strictly" against the Government. 119 F.3d at 1584. The Indian Self-Determination Act contains a contract clause expressly requiring a rule of construction favoring the

contracting tribe, 25 U.S.C. § 450*l*(c), *Model Agreement*, sec. 1(a)(2).[8]

As in *New Valley*, the Government here reads its own exculpatory clause expansively to vitiate the entire purpose of the contract support provisions of the contract. That reading defeats the express intent of Congress in the 1988 and 1994 amendments to preserve program levels by providing full contract support costs to each contractor. The Government's construction thus contravenes the Court's directive that an Act of Congress "cannot be held to destroy itself". *AT&T v. Central Office Telephone., Inc.*, 524 U.S. 214, 227-28 (1998) (quoting *Texas & Pac. Ry v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)). *See also Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997).

Congress has never amended its original statutory directive making contract support a mandatory add-on proportional to the Secretarial program amount. Section 314 of the 1999 appropriations act, Pub. L. 105-277, 112 Stat. 2681, 2681-288 (1998), and the similar sections in later appropriations legislation simply limit the Secretary's *expenditure* authority for contract support. By contrast, *see Republic Airlines, Inc. v. U.S. Department of Transportation*, 849 F.2d 1315, 1322 (10th Cir. 1988), where the appropriations act clearly and specifically amended the governing statute.

---

8. Further, federal statutes enacted for the benefit of Indians (such as the Indian Self-Determination Act) are to be construed liberally in favor of Native Americans, with ambiguous provisions construed in their favor. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985).

Moreover, the Government has express trust and good faith duties with respect to Indian health care. 25 U.S.C. § 450*l*(c), Model Agreement, sec. 1(d)(1) and (2). The latter paragraph provides:

> To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperation with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. 1601 *et seq.*).

At the very least, these obligations encompass the duty to request sufficient appropriations, requests the Government has not made.[9] Courts construe funds available clauses strictly against the drafter, especially when the Government is at least partially responsible for an insufficiency in appropriations. In *S.A. Healy Co. v. United States*, 576 F.2d 299 (1978), the Court of Claims considered a broad funds available clause. The clause expressly limited the Government's liability when funds were not available. But, because it did not clearly shift the risk that the agency would fail to request sufficient appropriations, the court held the clause ambiguous and construed it in favor of the contractor:

9. The 1988 amendments to the act require the agencies to provide contract support costs to tribes for their reasonable costs associated with administering the BIA's and IHS' programs. However, since at least 1993, neither BIA nor IHS has requested full funding for these costs, nor has the Congress appropriated full funding for them. . . .

U.S. General Accounting Office, INDIAN SELF-DETERMINATION ACT: SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED 34-35 (No. GAO/RCED-99-150, June 1999).

> Whether or not the funds available clause clearly allocates all risk of loss to the contractor when Congress cuts budget requests, we hold that the clause as a whole is not sufficient to shift the burden to the contractor when the administrative agency is at least partly to blame for the funds shortage.

Id. at 305.

> In short, then, we hold that the protective umbrella of the funds available clause, as worded in this contract, does not extend to an exhaustion of funds occasioned by the agency's decision to request funding grossly inadequate to support the level of earnings approved by the agency for the fiscal year. . . . We hold only that . . . a contract will not be construed to throw all the cost and loss necessarily incident to such a decision on the contractor, and none of it on the party whose decision caused the loss, unless clauses of the contract require that result without ambiguity. . . .

Id. at 307.

Citing *S.A. Healy Co.*, the court in *San Carlos Irrigation & Drainage District v. United States*, 23 Cl. Ct. 276 (1991), held that a non-Indian Bureau of Indian Affairs contractor could collect when the Government failed to perform its contractual obligation to maintain irrigation works. Among the defenses the Government asserted was this funds available clause:

> Where the operations of this contract extend beyond the current fiscal year, the contract is made

> contingent upon Congress making the necessary appropriations for expenditures hereunder after such current year shall have expired. In case such appropriation as may be necessary to carry out this contract is not made, the District hereby releases the United States from all liability due to the failure of Congress to make such appropriations.

Id. at 283-83. In rejecting this and other defenses, the court stated: "The United States cannot escape liability under the contract because the BIA did not attempt to obtain appropriations from Congress to repair the spillway gates." *Id.* at 283.

CONCLUSION

Expenditures for the fulfillment of contract obligations – debts of the United States – have priority over discretionary expenditures. The proviso at 25 U.S.C. § 450j(1)(b), providing that in the event of an insufficiency of appropriations the Secretary is not required to make expenditures for the fulfillment of contract obligations where to do so would necessitate reductions in services to non-contracting tribes, speaks to the Secretary's expenditure authority. It is an implicit recognition of contract authority.

The Government's reading contravenes the longstanding rule that a government contract is an assurance that the sovereign right to withhold payment will not be exercised because the government's "promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." *Murray v. Charleston*, 96 U.S. 432, 445 (1878) (quoted by Mr. Justice Breyer, concurring in *United States v. Winstar*, 518 U.S. 839, 913 (1996)).

A decision in favor of the Government in the two cases under review in this Court would negate the 1988 and 1994 amendments and thus thwart the express intent of Congress to fix the contract support problem once and for all. It would return to treating self-determination contracts as social welfare grants as the court did in *Busby School of the Northern Cheyenne Tribe v. United States*, 8 Cl. Ct. 596, 600 (1985), cited with opprobrium in Senate Report No. 100-274, at 34 (1987). Public Laws 100-472 and 103-413 made clear that they indeed are contracts like any other. This Court should carry out the will of Congress by enforcing self-determination contracts just as federal contracts with non-Indians are enforced.

For these reasons, the decision of the Federal Circuit in *Thompson v. Cherokee Nation* should be affirmed and the decision of the Tenth Circuit in *Cherokee Nation v. Thompson* should be reversed.

Respectfully submitted,

C. Bryant Rogers
Roth, Vanamberg, Rogers,
Ortiz & Yepa, LLP
P.O. Box 1447
Santa Fe, NM 87504
(505) 988-8979

Michael P. Gross
Counsel of Record
Daniel H. MacMeekin
Eric Treisman
M.P. Gross & Associates, P.C.
460 St. Michael's Drive
Suite 401
Santa Fe, NM 87505
(505) 995-8066

Counsel for Amici Curiae

APPENDIX — LETTER FROM JOHN R. BOLTON TO DANIEL K. INOUYE DATED MARCH 11, 1988

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530

March 11, 1988

Honorable Daniel K. Inouye
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Inouye:

In a letter dated October 27, 1987, I informed the Select Committee on Indian Affairs of the Department's objections to S. 1703, the "Indian Self-Determination and Education Assistance Act Amendments of 1987." My recent letter of January 26, 1988 expanded upon those objections insofar as they concerned application of the Indian Civil Rights Act to self-determination programs. Further comment upon section 201(c) of the Committee amendment to S. 1703 is also warranted, particularly in light of an amendment to section 103(c) of the Indian Self-Determination and Education Assistance Act enacted as part of the Continuing Resolution for fiscal year 1988. In fact, the need for section 201(c) of the Committee amendment to S. 1703 largely appears to have been obviated.

Appendix

As it now reads, amended section 103(c) of the Indian Self-Determination and Education Assistance Act ("the Act") provides as follows:

> The Secretary of Health and Human Services is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this subchapter to obtain adequate liability insurance: *Provided, however.* That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance. For purposes of section 224 of the Public Health Service Act of July 1, 1944 (42 U.S.C. 233(a)), as amended by section 4 of the Act of December 31, 1970 (84 Stat. 1870), with respect to claims for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under sections 103 or 104(b) of this Act is deemed to be part of the public Health Service in the Department of Health and Human services while

Appendix

> carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of title 28) are deemed employees of the service while acting within the scope of their employment in carrying out the contract or agreement.[1]

This new language will allow persons injured by certain acts of medical negligence to pursue a damage remedy against the United States under the Federal Tort Claims Act ("FTCA") in place of any remedy they may otherwise have had against a physician or health care provider. As you know, such a result had been a fundamental basis for our original opposition to S. 1703.[2]

In light of the above changes to section 103(c) of the Act, section 201(c) of the Committee amendment doubtless will be eliminated or amended further. We wish to express a concern which we hope will be taken into account in that process.[3]

---

1. The highlighted language was added by the Continuing Resolution.

2. Section 201(a) of an unamended S. 1703 essentially would have accomplished the identical result by adding similar language to a renumbered section 102(c) of the Act.

3. We continue to be opposed to the notion that the Indian tribes should be singled out for special treatment by absolving them from responsibility for their negligence in administering self-determination

(Cont'd)

As the Committee has recognized, whatever the merits of providing FTCA protection to Indian tribes and their employees, that protection should *not* extend to private physicians or health care providers who may be providing contract health care under a self-determination contract to a tribal organization -- so-called "indirect health care providers." *See* S. Rep. No. 274, 100th Cong., lst Sess. 27 (Dec. 22, 1987). It follows that the term "Indian contractor," as now contained in section 103(c) of the Act, should not be construed to include such private physicians and health care providers. And, in a letter to you dated November 18, 1987, Mr. Lloyd B. Miller, writing on behalf of "many Indian tribes and tribal organizations," specifically disavowed any intent or desire to bring these subcontractors within the FTCA.[4]

(Cont'd)

health care contracts. Recognizing, however, that amendments to section 103 of the Act are a fait accompli, we offer the following as a suggestion to ensure that this new language is applied in a manner consistent with our previously expressed concern that third-party health care providers who contract with the Indian tribes not be included within the scope of persons now protected by the FTCA under section 103 (c) of the Act.

4. It should be noted that, for sound reasons rooted in public policy, the FTCA expressly does *not* apply to contractors of the United States. 28 U.S.C. 2671 ("Federal agency . . . does not include any contractor of the United States.") Thus, the inclusion of indirect health care providers within the term "Indian contractor" would not only be inconsistent with Congress's clearly expressed intent that the FTCA not cover independent government contractors, but would also unjustifiably give favored treatment to some such contractors but not others.

Nor would such a course of action be advisable from the standpoint of seeking to deter medical malpractice.[5]

Although we seem to be in agreement on this basic point, our common understanding of the properly limited scope of "Indian contractor" is not self-evident from the Act, as amended by the Continuing Resolution. To our knowledge, the term "Indian contractor" is nowhere defined in the Act. Unfortunately, it is our experience that in cases where the deep pocket of the federal government is involved, any ambiguity in the law all too often is exploited in litigation to the detriment of the United States.

Accordingly, we strongly recommend that section 201(c) of the Committee amendment to S. 1703 be replaced with language which would simply delete the reference to "Indian contractors" in section 103(c) of the Indian Self-Determination and Education Assistance Act added by the Continuing Resolution. This clarification should allow section 103(c) to be applied with a minimum of interpretive problems.

If, instead, the Committee intends to ignore the recent amendment to section 103(c) in favor of the more sweeping

---

5. Our concern that the United States not accept responsibility for professional negligence unless it is accompanied by an adequate opportunity to control and supervise professional conduct is doubly important in this context. However limited may be the federal government's ability to control and supervise the tribes themselves, it far exceeds in scope any influence the federal government may exert over the medical, practice of persons who independently contract with the tribes.

changes presently contained in section 201 of the Committee amendment, a different aspect of providing FTCA protection to tribal contractors is implicated.[6] Although the report language discussing section 201 is confined to the area of medical malpractice, section 201 of the Committee amendment would extend the FTCA's coverage to *all* tribal negligence associated with carrying out virtually *any* self-determination contract, grant agreement, or cooperative agreement -- not just those associated with the provision of health care.

Whatever the particular merits of accepting federal responsibility for tribal medical malpractice, no need has been demonstrated for extending that indemnification to tribal conduct associated with the various other activities performed or capable of being performed by way of self-determination contracts or agreements. As presently structured in section 201, the United States will end up accepting financial responsibility for any number of everyday accidents that it had no hand in causing and that have no connection whatsoever to its obligations to the Indian tribes.[7] It is

6. Section 201 of the Committee amendment does not contain the ambiguous reference to "Indian contractors," and the report accompanying S. 1703 makes it clear that private physicians and health care providers are not to be extended the protection of the FTCA.

7. The largest source of non-medical malpractice liability exposure will be automobile accidents, slip and fall cases, and similar "garden variety" type torts. We simply do not understand why the United states should accept financial responsibility for automobile accidents and similar everyday torts involving tribal employees.

imperative, in this regard that, as it is now, section 103(c) of the Act (becoming section 102(c) if S. 1703 is enacted) clearly be limited to medical malpractice claims.

Aside from the above suggestions, and those expressed earlier, we continue to have fundamental concerns with other provisions of the Committee amendment to S. 1703. Among other concerns, we object to proposed section 110 of the Act as contained in section 206 of the Committee amendment to S. 1703.

Proposed section 110(a) would grant jurisdiction to the United States district courts over any civil action or claim arising under the Act, expressly including any claim for money damages arising under a self-determination contract. In other words, despite applying the Contract Disputes Act to self-determination contracts for all other purposes, tribal contractors are to be exempted from the requirements of that Act when it comes to seeking judicial review of contracting officers' decisions and decisions of agency boards of contract appeals.[8]

Instead of a trial *de novo* in the United States Claims Court, or before an agency board of contract appeals (41 U.S.C. §§ 606 & 609(a)) -- both of which possess vast expertise in the law applicable to government contract claims[9]

8. This logically follows from proposed section 110(a), and is made explicit in proposed section 110 (d) (2) as contained in section 206 of the Committee amendment to S. 1703.

9. For example, members of agency boards of contract appeals must have a minimum of five years experience in public contract law. 41 U.S.C. § 607(b)(1) (1982).

-- a tribal contractor would be allowed to challenge an adverse contracting officer's decision in a United States district court that likely has little or no experience with government contracts or the Contract Disputes Act. The various -- and constantly changing -- U.S. Attorneys' offices will face a similar problem in trying to defend against claims they otherwise have no occasion to litigate.

Moreover, instead of an appeal *on the record* to the United States Court of Appeals for the Federal Circuit (41 U.S.C. § 607(g)(1)), a tribal contractor will be allowed to challenge an adverse determination by an agency board of contract appeals in the Claims Court or a United States district court. We are aware of no justification for this unprecedented departure from the "fair, balanced, and comprehensive statutory system of legal and administrative remedies" established by the Congress in the Contract Disputes Act to resolve contract-related claims against the government. *See* S. Rep. No. 1118, 95th Cong., 2d Sess. 1 (Aug. 15, 1978). Singling out tribal contractors in this way raises significant litigative problems. It also is likely to generate pressure from other classes of government contractors seeking the same opportunity.

The report accompanying the Committee amendment to S. 1703 provides no persuasive rationale for creating a specialized scheme of judicial review for disputes involving self-determination contracts. The report notes that:

> The amendments made by section 110 are necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the Self-Determination Act. The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. . . . Existing law affords such contractors no effective remedy for redressing such violations.

S. Rep. No. 274, 100th Cong., lst Sess. 37 (Dec. 22, 1987). We strenuously dispute the allegations contained in the above passage. But even if true, these assertions simply justify application of the Contract Disputes Act -- in toto -- to self-determination contracts. They provide no basis for applying that Act in part, but then establishing a completely new method of judicial review.

The report speaks at length about a perceived inability on the part of tribal contractors to obtain necessary redress under current law. Although we do not completely accept those contentions, they are irrelevant in determining whether the tribes should be provided judicial remedies other than those contained in the Contract Disputes Act. In the past, any problem in obtaining judicial review of a self-determination contract dispute principally could be attributed to the fact that the Contract Disputes Act did *not* apply to such contracts.[10] But S. 1703 changes that simple fact.

Now that the Contract Disputes Act is to apply to self-determination contracts, there is no persuasive reason for

---

10. *Busby School of the Northern Cheyenne Tribe v. United States*, 8 Cl. Ct. 596 (1985); *Papago Indian Tribe of Arizona*, IBCA-1962 and IBCA 1966, (1986), 22 I.D. 191, 86-2 BCA 18,859.

allowing the Indian tribes to deviate from the time-tested method of seeking judicial review specifically provided for in that Act. No doubt other government contractors also would prefer to litigate their contract claims in the district courts. But the United States Claims Court is highly specialized and experienced in resolving both contract disputes and Indian claims. It is a court of nationwide venue, access to which has been made convenient for litigants across the country. There is no plausible reason for granting tribal contractors the right to avoid that forum at their whim.

In addition to the lack of any reasonable basis for exempting tribal contractors from the provisions concerning judicial review contained in the Contract Disputes Act, the alternative provisions contained in proposed section 110(d)(2) would increase transaction costs, as well as raise significant questions of law. For example, tribal contractors would have an additional level of review available in challenging a contracting officer's decision. Under the Contract Disputes Act, a contractor has one chance at *de novo* review (before an agency board of contract appeals *or* in the United States Claims Court), one appeal as a matter of right from that review (to the Federal Circuit, regardless of the trial forum), and subsequent discretionary review in the United States Supreme Court (28 U.S.C. § 1254). Under proposed section 110(d)(2), an additional level of review is injected for no apparent reason.[11]

---

11. Under proposed section 110(d)(2), a tribal contractor might first challenge an adverse contracting officers decision before an agency board of contract appeals. If the contractor is dissatisfied with the board's decision, that decision can then be challenged, as a

(Cont'd)

We vigorously contest any notion that an additional layer of review of self-determination contract claims is necessary or desirable. Not only will this delay the resolution of self-determination contract claims, but it is equally sure to increase the transaction costs associated with pursuing and defending such claims.

The judicial review provisions in proposed section 110(d)(2) also are likely to produce a real deal of uncertainty in the law. Under the Contract Disputes Act, the United States Court of Appeals for the Federal Circuit is principally responsible for and capable of developing a stable body of law applicable to resolving public contract disputes. That may well change for the worse if proposed section 110(d)(2) is enacted. Because that proposed section would allow self-determination contract claims to be litigated in the various district courts, those courts routinely would be asked to rule upon questions of public contract law.

The question then becomes whether those courts should consider themselves bound by Federal Circuit precedent. The Committee amendment does not answer that question. Nor is the answer obvious under existing law. Credible arguments can be made for appellate jurisdiction over district

---

(Cont'd)

matter of right, in either the Claims Court or a United States district court (for still another *de novo* review?). And, of course, the decision of either the Claims Court or the district court will also be appealable as a matter of right to a Circuit Court of Appeals, with discretionary review in the United States Supreme Court. This scenario could result in four separate decisions upon the merits of a self-determination contract claim before it is finally resolved.

court decisions involving self-determination contracts in both the Federal Circuit and the regional circuits. *Compare* 28 U.S.C. §§ 1294 and 1295(a)(10).

The potential for confusion may well be exacerbated by section 204 of the Committee amendment, which would exempt self-determination contracts from the coverage of federal procurement law and federal acquisition regulations. To the extent there is a recognizable body of public contract law, it largely has evolved as the courts or agency boards of contract appeals have interpreted and applied federal procurement law and the federal acquisition regulations.[12] Regardless that self-determination contracts may not otherwise be considered "procurement contracts," unless this body of existing law can be looked to for guidance, the courts and boards will have no foundation upon which to resolve disputes.

This legislation would create a most disturbing anomaly. Self-determination contracts would be subject to some -- but not all -- of the procedural aspects of the Contract Disputes Act. At the same time those contracts would not be subject to the substantive law interpreting and applying that Act. And many of the courts being asked to deal with this confusion will have had no prior experience with public contract law.

---

12. The Contract Disputes Act, by its terms and from the legislative history, was carefully crafted to apply principally to "procurement contracts." *See* 41 U.S.C. 602(a) (1982) (With the exception of contracts for the sale of personal property, the Contract Disputes Act applies solely to contracts to procure goods or services.). As a result, the substantive law involving the Contract Disputes Act essentially is procurement contract law.

In short, what heretofore has been a relatively stable body of law will become yet another legal quagmire. And, of course, when the law is unsettled, the incentive for litigation increases. No one benefits from such a result -- not the government, not government contractors, and certainly not the Indian tribes.

Applying the Contract Disputes Act to self-determination contracts raises many serious concerns.[13] The adequacy of the Acts framework for judicial review, however, is not one of them. As a result, S. 1703 should allow tribal contractors the very same opportunity for, and standard of, judicial review that is available to every other government contractor, but no more.

For strong public policy reasons, we also must continue to object to proposed section 110(e), which makes both the Contract Disputes Act and the Equal Access to Justice Act (EAJA) applicable retroactively to tribal contractors whose self-determination contract disputes were resolved between March 17, 1986, and the enactment of S. 1703. Retroactive application of laws like the EAJA to controversies which

---

13. For example, because funding for self-determination contracts is appropriated and managed in markedly different fashion from other agency appropriations, with the agency having much less flexibility to shift self-determination funds, applying the Contract Disputes Act -- and its provisions concerning access to and reimbursement of the Judgment Fund for successful claims -- to self-determination contracts may well lead to a significant loss of agency and congressional control over appropriations for the self-determination program.

already have been resolved often generates more inequity -- not to mention problems and expense -- than it rectifies.[14]

For the reasons stated above, and those contained in my letter of October 27, 1987, we remain opposed to S. 1703, as amended. The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

s/ John R. Bolton
John R. Bolton
Assistant Attorney General

cc: Honorable Daniel K. Evans
Honorable Joseph R. Biden
Honorable Strom Thurmond

---

14. The Committee report suggests that this retroactivity is premised upon the same rationale which supported the retroactive application of the 1985 amendments to the EAJA. S. Rep. No. 274, at 37. But this rationale is incorrect. At the time the 1985 amendments to the EAJA were enacted, the EAJA had lapsed because earlier reauthorization legislation had been vetoed. The President's veto did not reflect any lack of support for the EAJA, but only his dissatisfaction with certain provisions of what was to be a permanent reauthorization. It was clear to all concerned that the EAJA ultimately would be reauthorized, and that it would be extended to cover those cases otherwise not covered because of the intervening lapse. As a result, all parties to those cases were, or should have been, aware that an application for fees and expenses under the EAJA ultimately might be appropriate. Unlike the disputes which likely would be revived by proposed section 110(e), in those cases there was ample incentive and notice to preserve the evidence and arguments which would likely bear upon the merits of any such application.